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SINCLAIR'S
CONSOLIDATED
DIVISION COURTS ACT;

—BEING—

CHAPTER 51 OF THE REVISED STATUTES
OF ONTARIO, 1887,

—AND—

The Division Court Amendment Act of 1888

—TOGETHER WITH—

CHAPTERS 61, 125, 214 AND 215

—OF—

SUCH REVISED STATUTES

—AND—

OTHER STATUTES OF 1888

—AND—

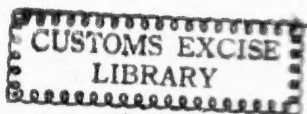
THE TARIFF OF CLERKS' AND BAILIFFS' FEES.

—BY—

JUDGE J. S. SINCLAIR,
OF HAMILTON, ONTARIO.

HAMILTON:
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Entered according to an Act of the Parliament of Canada, in the year of our Lord one thousand eight hundred and eighty-eight, in the office of the Minister of Agriculture, by JAMES SHAW SINCLAIR, Q. C., Judge of the County Court and Local Judge of the High Court of Justice at Hamilton.



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TO
THE HONORABLE
O. S. HARDY, Q. C.,

PROVINCIAL SECRETARY

—FOR—

The Province of Ontario,

This Work

—IS,—

WITH HIS PERMISSION,

Respectfully Inscribed.

PREFACE.

IT is now nine years since the issue of my Division Courts Act, 1879, and since then many additions and amendments have been made to the Act as it then stood. From time to time such changes rendered a discussion of them necessary, and I did so. The acceptance of such works proved that they were required.

In the consolidation and revision of the Statutes last year, the several Division Courts Acts then in force were all brought together, revised, and consolidated as one Act. When this was done, the writer saw the necessity of publishing the Act in some shape, and at first determined that such should be done without note or comment. On reflection he saw the inutility of this course, and decided to abandon it and pursue the usual course of annotating each Section or giving such a reference to the works of 1879, 1880, and the later works and authorities, as would render a fuller annotation than I have here given quite unnecessary. I have done so; but in many respects this work is much more extensive in the range of subjects commented on than any other that I have written on the subject of Division Court law. In order to afford every one engaged in the profession of the Law, whether as student or practitioner, a ready means of consulting the standard treatises and Digests on every question that I thought might come up for discussion in Division Courts—including the question of Jurisdiction—and in many other Courts as well, I have made no less than seventy-six pages of notes with the object I have mentioned. I trust that much time will be saved by a frequent reference to pages 38-114. Many may not have the works that are cited, but it must be remembered that Law can only properly be known by consultation with the best authorities on any subject. To the reader I have to say that in all cases I have tried to cite the latest editions of law books, and especially from the "Blackstone" Text Book Series, now so easily obtainable.

I have carefully collected all special Forms of proceedings previously devised or framed by me (eighty-nine in all), rendered necessary by the different provisions of the then Consolidated Act of 1877, and by later legislation. These are independent of the ordinary official Forms which are in the hands of almost everybody requiring them.

In these pages will also be found certain Acts which are most required in proceedings at trial. For instance, the following are here given: An Act respecting Witnesses and Evidence, The Chattel Mortgage and Bills

of Sale Act, The Overholding Tenants Act, The Protection of Sheep Act, An Act respecting Pounds, The Division Courts Amendment Act of 1888, the Act respecting Conditional Sales of Chattels passed during the Session of 1888, together with the proper Tariff of Fees to be taken by Clerks and Bailiffs. To such officers I think this work will be found a *necessity*.

There cannot be a useful book without a good Index of Subjects—which, it is hoped, will be found in this one. For the preparation of this, the Index of Cases and the Classified Index of Forms, I have sincerely to thank Mr. JOHN G. GAULD, of Hamilton, student-at-law, whose labour in their preparation has been great and untiring.

When it is considered that in 1879 there were only 244 Sections to the Division Courts Act, and now, independently of the Act of last Session, there are 304 Sections, many of which comprise several Sections of previous legislation, it is not to be wondered at that the present work in all comprises well on to 500 pages.

I trust that it may obtain that kindly reception from a forbearing public which previous efforts on this subject have uniformly received.

J. S. SINCLAIR.

HAMILTON, May, 1888.

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THE CONSOLIDATED
DIVISION COURTS ACT

OF THE PROVINCE OF ONTARIO,

BROUGHT INTO FORCE ON THE 31ST DAY OF
DECEMBER, 1887.

*Revised Statutes of the Province of Ontario,
pages 540-609.*

CHAPTER 51.

An Act respecting the Division Courts.

[31st December, 1887.]

HER MAJESTY, by and with the advice
and consent of the Legislative Assembly
of the Province of Ontario, enacts as follows:

1. (a) This Act may be cited as "*The* Short title.
Division Courts Act," R. S. O. 1877, c. 47, s. 1.

2. (b) In the construction of this Act, Interpre-
tation
"County" shall include two or more counties "County."
united for judicial purposes; and in any
form or proceeding the words "United
Counties" shall be introduced where neces-
sary. R. S. O. 1877, c. 47, s. 2.

(a) Sinclair's D. C. Act, 1879, 1, 2.

(b) Sinclair's D. C. Act, 1879, 3. As to the meaning of the word "County,"
also see R. v. Isle of Ely, 15 Q. B., 827; Evans v. Stevens, 4 T. R., 224;
R. v. Pearce, 5 Q. B. D., 386; R. v. Shavelear, 11 Ont. R., 727.

Courts
con-
tinued.

3. (c) The Division Courts, and the limits and extent thereof existing at the time this Act takes effect, shall continue until altered by law. R. S. O. 1877, c. 47, s. 3.

Number
of Courts
in coun-
ties, cities
and
towns.

4. (d) There shall not be less than three or more than twelve Division Courts in each county, of which Division Courts there shall be at least one in each city and county town. R. S. O. 1877, c. 47, s. 4.

Designa-
tion of
Court.

5. (e) The Court in each division shall be called "The First Division Court in the county of _____," (or as the case may be). R. S. O. 1877, c. 47, s. 5.

Each
Court to
have a
seal.

6. (f) Every Division Court shall have a seal, with which all process of the Court shall be sealed or stamped, and such seal shall be paid for out of the Consolidated Revenue Fund. R. S. O. 1877, c. 47, s. 6.

(c) Sinclair's D. C. Act, 1879, 3.

As to the alteration of the limits of Division Courts in any county or union of counties, see Sections 13, 14, 15, of this Act.

(d) Sinclair's D. C. Act, 1879, 3.

There must be not less than *three* Division Courts in any county. There cannot possibly be more than *twelve*, even under Section 14. Whatever the number may be, there must at least be in each city in the county one Court, and one in each county town.

(e) Sinclair's D. C. Act, 1879, 3.

The designation of the Courts shall be in numbers, specifying that they are Courts of a particular county or union of counties, as the case may be. There is no particular mode of numbering the Courts, except where a Court is established under Section 14, and then such Court shall be numbered and called the number of the Division Court of the county in which it is so established next after the highest number of the Courts then existing in such county.

(f) Sinclair's D. C. Act, 1879, 3.

As to what constitutes a seal, and its necessity, see also *Re Bell and Black*, 1 Ont. R., 125; *Re Sandilands*, L. R., 6 C. P., 411; *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1, 22 L. J. N. S., 378, S. C.; *McLean v. Bradley*, 2 Sup. R., 535; *Clarke v. Union F. Ins. Co.*, *Caston's Case*, 10 P. R., 339; *The Canada Central Railway Co. v. Murray*, 8 Sup. R., 313; *R. & J.*, 3463, 771-779, 4376; *Ontario Digest*, 1884, 147-151; *Ontario Digest*, 1887, 117; 2 *Mew's Digest*, 1269-1800. The above authorities have also reference to Corporations.

7. (g) The Division Courts shall not be held to constitute Courts of Record, but the judgments in the said courts shall have the same force and effect as judgments of Courts of Record. R. S. O. 1877, c. 47, s. 7.

Not to be
Courts of
Record.

8. (h) A court shall be holden in each division once in every two months, or oftener in the discretion of the senior or the acting County Judge; and the Judge may appoint and from time to time alter the times and places within such divisions, when and at which such courts shall be holden. R. S. O. 1877, c. 47, s. 8.

Time and
place of
holding
Courts.

(g) Sinclair's D. C. Act, pages 4-7.

As to judgment generally, and its effect, see also *Phosphate Sewage Co. v. Molleson*, 1 App. Cas. 780-4, App. Cas. 801; *National F. Ins. Co. v. McLaren*, 12 Ont. R., 682; *Fowler v. Vail*, 4 App. R., 267; *Shaw v. Crawford*, 4 App. R., 371; *Re Donovan Wilson v. Beatty*, 29 Grant, 280; *Brunsdon v. Humphrey*, 14 Q. B. D., 141; *Martin v. Evans*, 6 Ont. R., 238; *Sorenson v. Smart*, 5 Ont. R., 678; *Concha v. Concha*, 11 App. Cas., 541; *Ex parte Revell*; *In re Tollemache*, 13 Q. B. D., 720; *McMahon v. Spencer*, 13 App. R., 430; *Dwarris on Statutes (Potter)*, 342, 28 Alb. L. J., 485; *Schnell v. Blohm*, 40 Hun, 378 S. C., 34 Alb. L. J., 42; *Carpenter v. Osborne*, 34 Alb. L. J., 177; *Lewis v. Adams*, 34 Alb. L. J., 375; *Strong v. Strong*, 33 Alb. L. J., 330; *Ontario Digest*, 1884, 395-398; *L. R. Digest* 1865-1880, 2013-2019; *L. R. Digest* 1881-1885, 704-707; *Re Eberts v. Brooke*, 20 U. C. L. J. N. S., 175, reversed on appeal 4 C. L. Times, 282; *Brinsmead v. Harrison*, L. R., 7 C. P., 547; *Cooley on Torts*, 138; *Sturtevant v. Robinson*, 18 Pick., 175; *Ex parte Drake*; *In re Ware*, 5 Ch. D., 866; *R. & J.'s Digest*, 1912 *et seq.*, and 4583 *et seq.*; *Ont. Digest* 1884, 391 *et seq.*; *Ont. Digest* 1887, 367 *et seq.*; 4 Mew's Digest, 1148-1164.

When a decision becomes a judgment; See *Roscoe's N. P.*, 13th Ed., 135; *Fisher's Digest*, 3673; *Nerlich v. Malloy*, 4 App. R., 430.

Fraudulent Judgment; *Sinclair on Absconding Debtors*, 101; *R. & J.'s Digest*, 1612, 3221; *Ont. Digest* 1884, 306; *Ont. Digest* 1887, 295; *Girdlestone v. The Brighton Aquarium Co.*, 3 Ex. D., 137; *Bridge v. Branch*, 1 C. P. D., 633; *Freeman (U. S.) on Judgments*, and *Piggott on Foreign Judgments*.

(h) *Sinclair's D. C. Act*, 1879, 6-7; *D. C. Law*, 1884, 11-13.

As to the discretion of the Judge, see *Reg. v. Adamson*, 1 Q. B. D., 201; *Maxwell on Statutes*, 2nd Ed.; *Wilson v. Church*, 9 Ch. D., 552 and 558; *L. R. Digest* 1885, 1413-1415; *L. R. Digest* 1880-1885, 508, 509; *Sinclair's D. C. Law*, 1884, 12.

Action on Judgment of Superior Court; See *Re Eberts v. Brooke*, 4 Can. L. T., 282; 4 Mew's Digest, 1158. Within the several divisions of the county the Judge has power, under this Section, to appoint and from time to time to alter the times and places when and at which the Courts shall be holden.

Holding
Courts in
cities.

9. (i) Notwithstanding anything contained in this Act, or any of the general rules in force in the Division Courts of this Province, in any city in which two Division Courts are established or held, all or any of the sittings of both of such courts may be appointed and held in any of such divisions, and both clerks of such courts may, with the approval of the Lieutenant-Governor in Council, have and keep their offices in the same division in such city. 43 V., c. 8, s. 41.

Division
Courts
accom-
moda-
tion.

10. (j) (1) The municipality in which a Division Court is held shall furnish a court room and other necessary accommodation for holding said court, not in connection with an hotel.

If there
be no
proper
Court-
room, etc.,
the Judge
may hold
Court in
any suit-
able
place.

(2) In case a proper court room, and other necessary accommodation for the holding of the Division Court are not furnished by the municipality in which the court is held, the Judge may hold the court in any suitable place in the division, or in any other division of the county in which suitable accommodation is provided; and the owner, lessee or tenant of the building in which the Court is so held, shall for the use of the building be entitled to receive from the municipality whose duty it was to provide proper accommodation for the court, the sum of \$5 for every day on which the court is held in the building. R. S. O. 1877, c. 47, s. 9.

Expenses
for rent.

Judge to
apportion
cost in
certain
cases.

(3) Where a municipality, not being a town or city, furnishes a court room and other necessary accommodation for a Division Court

(i) Sinclair's D. C. Act, 1880, 68-69.

(j) Sinclair's D. C. Act, 1879, 7-8; Sinclair's D. C. Law, 1885, 218-222.

as aforesaid, or pays any owner, lessee, or tenant for the use of any building, it shall be entitled to recover from any other municipality wholly or partly within the division for which such court is held, such reasonable share of the cost of providing accommodation for holding the court as shall in that behalf be decided and ordered by the Judge of the said court, to be paid and contributed by the latter municipality; and in every such case the total cost of providing such accommodation for holding the court shall be deemed to be \$5 for every day on which the court is held. 48 V., c. 14, s. 12.

11. (k) The sittings of the Division Court in a county town may be held in the county court house, and in the cases of cities and towns separated from the county, the use of the court house for such purpose may be taken into account in settling the proportion of the charges to be paid by the city or town for the maintenance of the court house. 43 V., c. 8, s. 42.

Use of
Court
House.

12. (l) If the Justices of the Peace for a county, in General Sessions assembled, certify to the Lieutenant-Governor that in any division of the county, from the amount of business, remoteness or inaccessibility, it is

The
Lieuten-
ant-Gov-
ernor
may, in
certain
cases,
regulate
holding of
Courts.

(k) Sinclair's D. C. Act, 1880, 69.

As will be seen at the above page of the work referred to, we think that this section gives the right to hold Division Courts for cities and county towns at the Court House. Of course the right could not be held to interfere with the sittings of Courts of higher jurisdiction.

(l) Sinclair's D. C. Act, 1879, 8-9.

It will be observed that one of three things must be established to the satisfaction of the Lieutenant-Governor in Council to justify his acting under this section; (1) the amount of business; (2) remoteness; (3) inaccessibility of the Division Court. As to "remoteness or inaccessibility," see Sinclair's D. C. Act, 1886, 68-70.

expedient that the court should not be held so often as once in every two months, the Lieutenant-Governor in Council may order the court to be held at such periods as to him seems meet, and may revoke the order at pleasure, but a court shall be held in the division at least once in every six months. R. S. O. 1877, c. 47, s. 10.

Alteration of number and limits of divisions.

13. (m) (1) The County Judge, the sheriff, the warden of the county, and the Division Court inspector may, subject to the restrictions in this Act contained, appoint and from time to time alter the number, limits and extent of every division, and shall number the divisions, beginning at number one, but no resolution or order made under the provisions of this section shall be altered or rescinded, unless public notice of the intention so to alter or rescind, or that application will be made to alter or rescind is made and proclaimed in open Court at the next previous sittings of the General Sessions of the Peace.

(2) The Judge shall cause the sheriff, warden and inspector to be notified of any application, and of the time and place at which the same will be considered. 49 V., c. 15, s. 1.

Establishment by the County Judge of a Division Court in Townships, on petition of Township Council.

14. (n) (1) The Judge of a County Court may, in his discretion, upon the petition of the Municipal Council of any township or united townships in which no Division Court has already been established, praying that a Division Court may be established in and for

See Sinclair's D. C. Act, 1886, 1-4.

See also D. C. Act, 1879, 11-12.

See also section 8, *In re McAlpine & Euphemia*, 45 U. C. R., 199; and D. C. Act, 1886, 6-7.

such township or united townships, establish and hold a Division Court therein, and the court so established shall be numbered and called the Division Court of the county in which such township or united townships is or are situated, taking the number next after the highest number of the courts then existing in such county.

(2) No business shall be transacted in such court until after the establishment thereof has been certified by the County Judge to the Lieutenant-Governor in Council, together with the petition praying for the same, nor until after an order has been passed by the Lieutenant-Governor in Council approving thereof. R. S. O. 1877, c. 47, s. 12.

Court must be confirmed by Lieutenant-Governor in Council.

15. (o) Where a junior county separates from a senior county or union of counties, the Division Courts of the united counties which were before the separation wholly within the territorial limits of the junior county, shall continue to be Division Courts of the junior county, and all proceedings and judgments shall be had therein and shall continue proceedings and judgments of the said Division Courts respectively; and all such Division Courts shall be known as Division Courts of such junior county by the same numbers respectively as they were before, until the Judge of the County, the sheriff, the warden of the county and the inspector of the Division Courts, appoint the number, limits and extent of the divisions for Division Courts within the limits of such junior county, as provided in section 13 of this Act. R. S. O. 1877, c. 47, s. 13; 49 V., c. 15, s. 2.

On separation of junior from senior county, Courts to continue same till altered by Sessions.

(o) Sinclair's D. C. Act, 1874, EL-12; Sinclair's D. C. Act, 1886, 5.

On alteration of divisions, Judge to direct in what Court proceedings to be continued.

16. (p) Where the Judge of the county, the sheriff, the warden of the county, and the inspector of Division Courts, alter the number, limits or extent of the Division Courts within such county, all proceedings and judgments had in any Division Court before the day when such alteration takes effect shall be continued in such Division Court of the county as the judge directs; and shall be considered proceedings and judgments of such court. R. S. O. 1877, c. 47, s. 14; 49 V., c. 15, s. 3.

Clerks and officers to deliver papers to such persons as Judge directs

17. (q) In case a junior county is separated from a union of counties, or the proceedings of any of the Division Courts of a senior county are transferred to another Division Court within the county upon the order of the Judge, the clerks or other officers of such Division Courts who hold any writs or documents appertaining to such courts or the business thereof, shall deliver up the same to such persons as the Judge directs, and any person refusing to deliver up the same shall be liable to be proceeded against in the same manner as persons wrongfully holding papers and documents under the provisions of section 50 of this Act. R. S. O. 1877, c. 47, s. 15.

After separation of junior from senior county, proceedings in certain cases to be continued in senior county.

18. (r) If after the separation of a junior county from a union of counties, the territorial limits of any of the Division Courts of the former union are partly within the junior and partly within the senior county, all proceedings commenced in such Division Courts of the former union shall be continued to com-

(p) Sinclair's D. C. Act, 1879, 12-13; Sinclair's D. C. Act, 1886, 6-7.

(q) Sinclair's D. C. Act, 1879, 13-14.

(r) Sinclair's D. C. Act, 1879, 13.

pletion in the court where the proceedings were originally commenced, or in such other Division Court of the senior county as the Judge thereof directs; and the clerks and other officers of the said Division Courts of such senior county in possession of any writs or documents appertaining to any such Court or to the business thereof, shall deliver over the same to the clerk of such Division Court of such county as the Judge thereof directs. R. S. O. 1877, c. 47, s. 16.

19. (s) The Judge of the county, the sheriff, the warden of the county, and the inspector of Division Courts, at a meeting to be called for the purpose, or at any adjourned meeting, shall, within three months after the issue of a proclamation for separating a junior from a senior county, appoint the number (not less than three nor more than twelve), the limits and extent of the several divisions within such county, and the time when such change of divisions shall take place, and no resolution or order made under the provisions of this section shall be altered or rescinded, unless public notice of the intention so to alter or rescind is made and proclaimed in open Court at the next previous sittings of the General Sessions of the Peace. 49 V., c. 15, s. 4.

Regulation of limits on separation of a county.

20. (z) The clerk of the peace, in a book to be by him kept, shall record the divisions declared and appointed, and the times and places of holding the courts, and the altera-

Clerks of the Peace to record time and place for holding Courts.

(s) Sinclair's D. C. Act, 1886, 8-10.

(t) Sinclair's D. C. Act, 1879, 15; Sinclair's D. C. Act, 1880, 25; Sinclair's D. C. Act, 1886, 8-10.

As to the meaning which has been attached to the word "forthwith," see

tions from time to time made therein, and he shall forthwith transmit to the inspector of legal offices a copy of the record. R. S. O. 1877, c. 47, s. 18; 47 V., c. 10, s. 16.

THE JUDGE.

County
Court
Judges
to pre-
side.

21. (u) (1) The Division Courts shall be presided over by the County Court Judges or Junior or Deputy Judges in their respective counties.

Junior
Judge to
hold
Division
Courts.

(2) The Junior Judge for the county shall (subject to any other arrangement from time to time made with the Senior Judge or made by the Judges of a County Court District which includes such county) preside over the Division Courts of the county.

Senior
Judge to
hold
Division
Courts
when ex-
pedient.

(3) The appointment of a Junior Judge shall not prevent or excuse the Judge of the County Court from presiding at any of the Division Courts within his county when the public interests require it. R. S. O. 1877, c. 47, s. 19.

R. v. Aston 1, L. M. & P., 491; Kenney v. Hutchinson, 6 M. & W., 134; Page v. Pearce, 9 Dowl., 815; R. v. Worcester, (Justices), 7 Dowl., 789; R. v. Robinson, 12 A. & E., 672; *Ex parte* Lowe, 15 L. J. M. C., 99; Sandford v. Alcock, 2 Dowl. N. S., 463; Drake v. Gough, 1 Dowl. N. S., 573; Tennant v. Bell, 9 Q. B., 684; Staunton v. Wood, 16 Q. B., 638; R. v. Ely, (Justices), 5 E. & B., 489; Thompson v. Gibson, 8 M. & W., 281; Pryme v. Brown, 1 Dowl. N. S., 680; Nelmes v. Hedges, 2 Dowl. N. S., 350; Chaplin v. Levy, 9 Ex., 673; Duncan v. Topham, 8 C. B., 225; *In re* Lake and Cor. of Prince Edward, 26 C. P., 173; McLaren v. Fiskien, 28 Grant, 352; McLellan *qui tam* v. Brown, 12 C. P., 542; R. v. Justices of Berkshire, 4 Q. B. D., p. 471; *Ex parte* Lamb. *In re* Southam, 19 Ch. D., 169.

(u) See Sinclair's D. C. Act, 1879, 15-18.

Should a Judge be in any way interested in the subject matter of the suit, he would be incapable of acting in that suit. R. v. Collins, 2 Q. B. D., 30, 35; Lush's Pract., 195; Bennett v. Brumfitt, L. R., 3 C. P., 28; *Re* Muskoka and Gravenhurst, 6 Ont. R., 352; R. v. Milledge, 4 Q. B. D., 332; Hill v. Managers of Met. Asylum District, 4 Q. B. D., 433; R. v. Bishop of Oxford, 4 Q. B. D., 245, 525; in H. of L., 5 App. Cas., 214; R. v. Handsley, 8 Q. B. D., 385; R. v. Lee, 9 Q. B. D., 394; *Re* Vasilin v. East Hawkesbury, 30 C. P., 194, 203; Borough of Freeport v. Marks, 59 Penn., 253-257; Strekert v. East Saginaw, 22 Mich., 104-112; Baird v. Almonte, 41 U. C. R., 415; Cannon v. Toronto Corn Exchange, 5 App. R., 268; Paley on Convictions, 6th Ed., 40-48

22. (v) In case of the illness or absence of the Judge, a Judge of the County Court of any other county may hold the court, or the first mentioned Judge may appoint some barrister of the Bar of Ontario to act as his deputy; and the Judge of such other County or the barrister so appointed shall, as Judge of the Division Court, during the time of his appointment, have all the powers and privileges, and be subject to all the duties vested in or imposed by law on the Judge by whom he has been appointed. R. S. O. 1877, c. 47, s. 20.

Who to
preside in
case of
illness or
absence
of Judge.

23. (w) The County Judge so appointing or the barrister so appointed deputy shall forth-

Lieuten-
ant-Gov-
ernor to

Randall v. Brigham, 7 Wallace, 523; Bradley v. Fisher, 13 Wallace, 335; Bingham v. Cabbot, 3 Dallas, 19; U. S. v. Lancaster, 5 Wheaton, 434; Slocum v. Sims, 5 Cranch, 363; Life & Fire Ins. Co. v. Wilson 8 Peters 291; Cooley on Torts, Chapter 14; Willis v. MacLachlan, 1 Ex. D., 376; Lowther v. Earl of Radnor, 8 East, 113-118; Frey v. Blackburn, 3 B. & S., 576; Pappa v. Rose, L. R., 7. C. P., 525; Tharsis Sulphur Co. v. Loftus, L. R., 8 C. P., 1; Stevenson v. Watson, 4 C. P. D., 148; Pollock on Torts, 99-101; Sinclair's D. C. Law, 1884, 66-68; Sinclair's D. C. Law, 1885, 138-141, 4 Mew's Digest, 1145-1148.

(v) Sinclair's D. C. Act, 1879, 18, 19.

Several decisions have taken place as to the authority of a Deputy Judge appointed under this Section and by the Governor-General in Council. In R. v. Fee, 3 Ont. R., 107, it was *Held*, (1) that where a Deputy Judge was appointed by the Governor-General in Council, it was not necessary to prove the Order in Council granting the leave of absence to the Judge; (2) that it was for the person setting it up to prove that the Commission to the Deputy Judge had expired; (3) that it was not necessary for the due appointment of the Deputy Judge that the Judge should be absent from the county.

The following rules are deducible from the case of *In re Leibes v. Ward*, 45 U. C. R., 375, where a Junior Judge had, under this Section, appointed a Barrister to hold the Sittings of a particular Division Court for him: (1) that the word "Judge" here used includes the Junior Judge; (2) that the deputation held good until the work of the particular Court was completed; (3) that a Deputy Judge so appointed had power to appoint a subsequent time and place in the County, though not in the Division of the Court, for subsequent delivery of judgment; (4) that the deputation itself clothed the gentleman so appointed Deputy Judge with all the powers, within the County, of Junior Judge. See also Gibson v. McDonald, 7 Ont. R., 401; Baker v. Cave, 1 H. & N., 674; Margate Pier Co. v. Hannam, 3 B. & Ad., 266; Waterloo Bridge Co. v. Cull, 1 E. & E., 213; Smith's Master and Servant, 4th Ed., 4, 5.

(w) Sinclair's D. C. Act, 1879, 19.

The notice of appointment should either be sent by the Judge or the Barrister so appointed "forthwith;" as to the meaning of which, see the notes to Section 20.

be notified of appointment of deputy.

with send to the Lieutenant-Governor notice of the appointment, specifying the name, residence and profession of the deputy Judge, and the cause of his appointment. R. S. O. 1877, c. 47, s. 21.

Duration of appointment.

24. (x) No such appointment shall be continued for more than one month without a renewal of the like notice; and in case the Lieutenant-Governor disapproves of the appointment, he may annul the same. R. S. O. 1877, c. 47, s. 22.

Adjournment of Court if Judge does not arrive in time.

25. (y) In case the Judge or the acting Judge, from illness or any casualty, does not arrive in time, or is not able to open a Division Court on the day appointed for that purpose, the clerk or deputy clerk of the court shall, after eight o'clock in the afternoon, by proclamation, adjourn the court to an earlier hour on the following day, and so from day to day, adjourning over any Sunday or legal holiday, until the Judge or acting Judge arrives to open the court, or until he receives other directions from the Judge or acting Judge. R. S. O. 1877, c. 47, s. 23.

CLERKS AND BAILIFFS, ETC.

Every Court to have clerk and bailiffs.

26. (z) For every Division Court there shall be a clerk and a bailiff or bailiffs, who shall be British subjects, and shall respectively per-

(x) Sinclair's D. C. Act, 1879, 19, 20.

It will be observed that the appointment must not continue for more than one month. The day of appointment would be excluded. If during its existence the Lieutenant-Governor should not approve of it, he could annul the same.

(y) Sinclair's D. C. Act, 1879, 20.

The word "holiday" has the same meaning as formerly. R. S. O., Chapter 1, Section 8, sub-Section 16.

(z) Sinclair's D. C. Act, 1879, 20, 21, 35-38.

As to the duties of Bailiffs on executing Writs of Execution, see Arch. Pract., 12th Ed., Chapter xxvii.; Chitty's Forms, 18th Ed., 384.

form the duties of their office as regulated by Act of the Legislature, and by rules or orders made by the board of County Judges. R. S. O. 1877, c. 47, s. 24.

27. (a) The Lieutenant-Governor may appoint, during pleasure, the clerk and bailiff or bailiffs of any Division Court. 43 V., c. 8, s. 33. Appointment of clerks and bailiffs.

28. (b) No clerk of a Division Court shall practice as a barrister or solicitor. R. S. O. 1877, c. 47, s. 25; 43 V. c. 8, s. 35. Clerk not to practice as barrister, etc.

29. (c) The Judge of the County Court may at pleasure suspend or remove any clerk or bailiff within his own county, heretofore appointed by a Judge. 43 V. c. 8, s. 36. Removal of clerk or bailiff by Judge.

30. (d) The Lieutenant-Governor may, upon the report of the Inspector or of the County Court Judge, dismiss from office for misconduct or incompetency, any clerk or bailiff heretofore appointed. 43 V. c. 8, s. 32. Dismissal of clerks and bailiffs.

(a) Sinclair's D. C. Act, 1880, 65.

Sinclair's D. C. Act, 1879, page 22, shews what the law formerly was. A Judge may suspend or remove an officer appointed by a Judge, but he cannot remove one appointed by the Lieutenant-Governor, although he may under Section 31 suspend him for cause.

(b) Sinclair's D. C. Act, 1879, 21; Sinclair's D. C. Act, 1880, 66.

If any one is a practicing Barrister or Solicitor at the time he is appointed either Clerk or Bailiff, he must cease practice at the time of his appointment. He could not even continue a suit in which he might be engaged. No penalty is attached to the violation of this Section, but the appointee would be liable to Indictment for its disobedience. R. v. Sainsbury, 4 T. R., 451; R. v. Davis, Sayer, 133; Russell on Crimes, 8th Amer., Ed. 49, 50.

(c) Sinclair's D. C. Act, 1880, 66.

The section only gives the power when the appointment of the officer has been made by a Judge.

(d) Sinclair's D. C. Act, 1880, 64, 65.

Where the Lieutenant-Governor appoints, he would have the inherent right of removal, 6 Mew's Digest, 278; but it is improbable that such a course would be adopted. Dismissal would probably only occur as the Section directs.

Duty of
County
Court
Judges.

31. (e) (1) Nothing in this Act contained shall relieve the County Judge from the responsibility of seeing that the officers of his court perform their duties, or from examining into complaints which may be made against them, or from the duties imposed upon him in reference to the security to be given by clerks and bailiffs, and such last mentioned duties are declared and shall be held to be of a judicial and not of an administrative character.

Suspension of
clerk or
bailiff by
Judge.

(2) The Judge, may for cause, suspend any clerk or bailiff appointed by the Lieutenant-Governor, and in case of such suspension by him, he shall forthwith report the same and the cause thereof to the Provincial Secretary ; and in case a vacancy shall occur in the office of clerk or bailiff within his county, the Judge shall forthwith notify the Provincial Secretary thereof. 43 V. c. 8, s. 34.

Inspector
may
grant
leave of
absence
to clerks
or bailiffs.

32. (f) Leave of absence may be granted by the Inspector of Division Courts to any clerk or bailiff for a period not exceeding two months. In the event of leave of absence being so granted to any clerk, he may from time to time, with the approval of the inspector, appoint a deputy to act for him with all the powers and privileges, and subject to like duties. He may remove such deputy at his pleasure, and the clerk and his sureties shall be jointly and severally responsible for

(e) Sinclair's D. C. Act, 1880, 65,66.

(f) Sinclair's D. C. Law, 1884, 75-79.

As to the powers and authority of the Inspector under this legislation, it is now settled that such enactments are not *ultra vires* The Provincial Legislature, *Citizens' Ins. Co. v. Parsons*; *Queen Ins. Co. v. Parsons*, 7 App. Cas., 96; *Hodge v. The Queen*, 9 App. Cas., 117. On the subject of this section generally see *R. v. Burah*, 3 App. Cas., 889; *Powell v. Apollo Candle Co.*, 10 App. Cas., 282; *Beaufort v. Crawshaw*, L. R., 1 C. P., 699; *Verratt v. McAulay*, 5 Ont. R., 313.

(g)
(h)
(i)
It
notif
not n

all the acts and omissions of the deputy. 45
V. c. 7, s. 3.

33. (g) The clerk may, (with the approval of the Judge), from time to time, when prevented from acting, by illness or other unavoidable accident, appoint a deputy to act for him, with all the powers and privileges and subject to like duties, and may remove such deputy at his pleasure, and the clerk and his sureties shall be jointly and severally responsible for all the acts and omissions of the deputy. R. S. O. 1877, c. 47, s. 35.

When clerk may appoint deputy.

34. (h) Where a bailiff is temporarily unable to perform the duties of his office from illness, leave of absence or other temporary disability, he may from time to time, with the approval of the inspector of Division Courts, appoint a deputy to act for him, with all the powers and privileges and subject to like duties, and may remove such deputy at his pleasure, and the bailiff and his sureties shall be jointly and severally responsible for all the acts and omissions of the deputy. No such appointment shall have force for a longer period than two months. 45 V. c. 7, s. 4.

Appointment of deputy by bailiff.

Securities.

35. (i) Subject to the provisions of section 24 of *The Act Respecting Public Officers*, every clerk and bailiff of a Division Court shall give security, by a covenant according to the form

Clerks and bailiffs to give security. Rev. Stat. c. 15.

(g) Sinclair's D. C. Act, 1879, 29,30.

(h) Sinclair's D. C. Law, 1884, 80,81.

(i) Sinclair's D. C. Act, 1879, 22,23.

It is submitted that either the Clerk or Bailiff could resign his office by notifying the Government to that effect, and that to effect a resignation it is not necessary that the same should be accepted or otherwise acted upon. In

of the Schedule to this Act, or in words to the same effect, with so many sureties, being freeholders and residents within the county, and in such sums as the County Judge directs, and, under his hand, approves and declares sufficient. R. S. O. 1877, c. 47, s. 27.

Before
clerk or
bailiff
enters on
his duties,
covenant
to be filed
with
Clerk of
the
Peace.

36. (*j*) Before a clerk or bailiff enters upon the duties of his office, the covenant of himself and sureties, approved as aforesaid, shall be filed in the office of the Clerk of the Peace in the county in which the Division Court is situate; and for filing and granting a certificate thereof, the Clerk of the Peace may demand from the clerk or bailiff the sum of \$1. R. S. O. 1877, c. 47, s. 28.

Covenant
to be

37. (*k*) The covenant shall be available to and may be sued upon in any Court of compe-

the case of *R. v. Corporation of Wigan*, 14 Q. B. D., 908, it was held so on the construction of the Municipal Corporations Act 1882, but in the case of Clerks and Bailiffs we think it would be so anyway. These officers are required, under this Section, to give the security which the Statute requires. It had better be in the form prescribed by the Act, but the Covenant would be good if "in words to the same effect." The sureties may be either legal or equitable freeholders. An overdue mortgage upon a man's land would be no bar if the equity of redemption should be worth the amount prescribed. The officer could not act until his Covenant was approved of by the Judge, declared "sufficient," and duly filed. The amount of security is fixed by the Judge, due regard being had for the increased jurisdiction of the Court. It must be observed that it is not every non-observance of a statutory duty that gives a right of action, *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D., 441, and before the sureties of a Clerk or Bailiff can be rendered liable on this Covenant, the act or omission charged must clearly be within its provisions. See *Preston v. Wilmot*, 23 U. C. R., 348; *Kero v. Powell*, 25 C. P., 448; *McLeish v. Howard*, 3 App. R., 503; *The Eastern Union R'y Co. v. Cochrane*, 9 Ex., 197. Should a surety not be a freeholder or resident of the county, he would still be liable on his Covenant. *Parks v. Davis*, 10 C. P., 229; *Sinclair's D. C. Act*, 1879, 23. A Clerk or Bailiff, and his sureties, would be liable for the acts of a deputy, not only under this Act, but otherwise. See *Verratt v. McAulay*, 5 Ont. R., 313.

(*j*) *Sinclair's D. C. Act*, 1879, 24, 25.

A newly appointed Clerk or Bailiff must be particular not to do anything of an official nature until his Covenant, duly approved and declared sufficient, has been filed with the Clerk of the Peace for the County.

(*k*) *Sinclair's D. C. Act*, 1879, 23-29.

As to the liability generally of sureties, see *Murray v. Gibson*, 28 Grant, 12,

tent jurisdiction by any person suffering damages by the default, breach of duty or misconduct of such clerk or bailiff. R. S. O. 1877, c. 47, s. 29.

available
to suitors,
etc.

38. (l) A copy of the covenant, certified by the Clerk of the Peace, shall be received in all Courts as sufficient evidence of the due execution, and of the contents thereof, without further proof. R. S. O. 1877, c. 47, s. 30.

Certified
copy of
covenant
to be re-
ceived as
evidence.

39. (m) (1) In an action, or proceeding against any person as the surety of a clerk or bailiff, the entries in the books required by law to be kept or which were so kept by such clerk or bailiff, shall be *prima facie* evidence against the surety.

Entries of
clerk or
bailiff
evidence
against
surety.

(2) For the purposes of this section the words "clerk or bailiff" shall be held to include a

21; *Paris Board of Education v. Citizens' Ins. Co.*, 30 C. P., 132; *Victoria M. Ins. Co. v. Davidson*, 3 Ont. R., 378; 36 Alb. L. J., 404-408; *Ex parte Young. In re Kitchin*, 17 Ch. D., 668; *Sinclair's D. C. Law*, 1884, 80, 109, 110, but see Section 39 of this Act; *Exchange Bank v. Springer*, 13 App. R., 390; *De-Colyar on Guarantees*, 2nd Ed., 177-407; 6 *Mew's Digest*, 111-248; R. & J., 3027-3057, 4679-4682; *Ont. Digest* 1884, 652-657; *Ont. Digest* 1887, 564, 567; *Atkinson v. The Newcastle and Gateshead Waterworks Co.*, 2 Ex. D., 441.

(l) *Sinclair's D. C. Act*, 1879, 27. See also the notes to Section 37 hereto.

The certificate of the Clerk of the Peace may be in the following form endorsed on the copy:

I, A. B., Clerk of the Peace for the County of _____ do hereby certify that the within is a true copy of the Covenant of C. D., Clerk of the _____ Division Court of the said county, and E. F. and G. H., his sureties to said Covenant, purporting to be approved and certified by the County Judge, the said Covenant having been duly filed in the office of the said Clerk of the Peace on the _____ day of _____ 18 ____.

Given under my hand, this _____ day of _____ A. D. 18 ____ at _____

Clerk of the Peace for the County of _____

If it is a Bailiff's Covenant of which the copy is required, the above can easily be changed. The certificate need not be in a different form if it is required in regard to one who was Clerk or Bailiff and has ceased to be such.

(m) *Sinclair's D. C. Law*, 1885, 199-205. See also the notes to Section 37 of this Act.

In addition to what has been said in the pages above referred to, it must be borne in mind that the "entries" here mentioned are only *prima facie* evidence, and may be contradicted if untrue.

person who, having been a clerk or bailiff, has ceased to be such clerk or bailiff. 48 V. c. 14, s. 9.

If surety dies, a new surety to be furnished.

40. (n) If a surety in such covenant dies, becomes resident out of Ontario, or insolvent, the County Judge shall notify the clerk or bailiff for whom such person became surety, of such death, departure or insolvency, and the clerk or bailiff shall within one month after being so notified, give anew the like security, and in the same manner as hereinbefore provided, or forfeit his office of clerk or bailiff. R. S. O. 1877, c. 47, s. 31.

Sureties of clerks and bailiffs may discontinue suretyship.

41. (o) Any person who has become surety for any clerk or bailiff, and who is no longer disposed to continue such responsibility, may give notice thereof to the clerk or bailiff, and to the Judge of the County Court, and in such

(n) Sinclair's D. C. Act, 1879, 27, 28.

As to a surety's becoming "resident out of Ontario," see the following works and cases: *Lawford v. Davies*, 4 P. D., 61; *National Ins. Co. v. Egleson*, 29 Grant, 406; *Sinclair's D. C. Act*, 1879, 86-88; *Sinclair's D. C. Act*, 1880, 22, 34; *R. ex rel. Taylor v. Caesar*, 11 U. C. R., 461; *Baker v. Wait*, L. R. 9, Eq. 103, 106; *Walcot v. Botfield*, 18 Jurist, 570; *Forbes v. Forbes*, 18 Jurist, 642; *Cartwright v. Hinds*, 3 Ont. R., p. 395; *Hodgins on Voters' Lists*, 258, title "Residence"; *Wellington v. Whitechurch*, 4 B. & S., p. 106; *Ex parte Breull. In re Bowie*; *Weekly Notes* 1880, p. 198; *Marr v. Cor. of Vienna*, 10 U. C. L. J., 275; *Mellish v. VanNorman*, 13 U. C. R., 451; *R. ex rel. Blasdel v. Rochester*, 7 U. C. L. J., 102; *Bank of Toronto v. Fanning*, 17 Grant, 514; *La Pointe v. G. T. R. Co.*, 26 U. C. R., 479; *In re Ladouceur v. Salter*, 6 P. R., 205; *Sinclair on Absconding Debtors*.

When a surety may be said to be "insolvent," See *Sinclair's D. C. Act*, 1879, 27, 28; *Bump on Bankruptcy*, 397, 398, 793, 794; *Warnock v. Kleopfer*, 14 Ont. R., 288; *Roe v. Macdonald*, 13 Ont. R., 352; *Teale v. Younge, McClell. & Y.*, 497; *Whitney v. Toby*, 6 Ont. R., 54; *Carbee v. Mason*, 34 Alb. L. J., 74; *Parsons v. Clark*, 33 Alb. L. J., 222; *Benton v. Holland*, 33 Alb. L. J., 383; *Blackburn on Sale*, 2nd Ed., 381, 382, 474.

(o) Sinclair's D. C. Act, 1879, 28, 29.

A person who has been a surety for a Clerk or Bailiff may determine his responsibility as this Section points out. If the officer does not furnish new security within one month after notice, duly approved of by the Judge, then his office is forfeited by this Section. The liability of the old surety only ceases after the perfecting and approval by the Judge of the new security. A

case the clerk or bailiff shall, under penalty of forfeiture of his office, furnish the security of a new surety in lieu of the surety so giving notice, and shall have the necessary bond or covenant approved by the Judge and completed within one month after such notice; and all accruing responsibility on the part of the person giving such notice shall cease upon and after the perfecting and approval by the Judge of the new security. R. S. O. 1877, c. 47, s. 32.

42. (p) Sections 15 to 20, both inclusive, of *The Act respecting Public Officers*, shall, with the substitution of "The Judge of the Court" for "The Lieutenant-Governor," apply to securities given by a clerk or bailiff of a Division Court. R. S. O. 1877, c. 47, s. 33. *See also Cap. 15, ss. 24-27.*

Sects. 15-20 of Rev. Stat., c. 15, to apply to securities given by clerks and bailiffs.

43. (q) Nothing hereinbefore contained shall discharge or exonerate any of the parties to such former covenant from their liability on account of any matter done or omitted before the renewal of the covenant as aforesaid. R. S. O. 1877, c. 47, s. 34.

Liability of former sureties.

difficulty may arise where the new security is not perfected within the month. We think, however, that the surety would only be held liable for one month after notice.

On the question of sureties' liability generally, see notes to Section 37 of this Act; *Molson's Bank v. Girdlestone*, 44 U. C. R., 54. As to the month's notice, see *Lawford v. Davies*, 4 P. D., 61; *Reed v. Smith*, 19 L. J. N. S., 12; *Nudell v. Williams*, 15 C. P., 348; *National Ins. Co. v. Egleson*, 29 Grant, 406; *Gordon v. Potter*, 1 F. & F., 644; *The Interpretation Act*, s. 8, subsection 15; *Vogel v. State*, 34 Alb., Alb. L. J., 377; *W. Notes*, 1887, 132.

(p) *Sinclair's D. C. Act*, 1879, 29.

The Sections referred to in Chapter 15, R. S. O., have reference to the security to be given by a public officer, and are made applicable to Division Court officers.

(q) *Sinclair's D. C. Act*, 1879, 29.

See also notes to Section 35 hereto; and as to the discharge and release of a surety, see 6 *Mew's Digest*, 176-231; R. & J., 3031-3046, 4679-4682; *Ont. Digest* 1884, 652; *Ont. Digest* 1887, 565; *Holme v. Brunskill*, 3 Q. B. D., 495;

Clerk's Duties.

Clerk to
issue
summons-
es and
furnish
copies, &c.

44. (r) The clerk shall issue all summonses, which summonses shall be by him filled up and shall be without blanks either in date or otherwise at the time of delivery for service; he shall also furnish copies of the same with the notice thereon, according to the form prescribed by the general rules or orders from time to time in force relating to Division Courts. R. S. O. 1877, c. 47, s. 36.

Overend, Gurney & Co. v. Oriental Financial Association, L. R. 7 H. L., 348-363; *Ward v. National Bank of New Zealand*, 8 App. Cas., 755; *Union Bank of Manchester v. Beech*, 12 L. T. S., 499; *Bonar v. Macdonald*, 3 H. L. Cas., 226; *Lloyds v. Harper*, 16 L. T. S., 290; *Harris v. Fawcett*, L. R., 8 Ch., 866; *Coulthart v. Clementson*, L. R., 1 D., 42; *Bradbury v. Morgan*, 1 H. & C., 249; *Ex parte Agra Bana*, *In re Barber*, L. R., 9 Eq., 725; *Ellis v. Wilmot*, L. R., 10 Ex., 10; *Ex parte Jacobs*, *In re Jacobs*, L. R., 10 Ch., 211; *Ridley v. Brady*, 33 Alb. L. J., 331; *B. & O. Ry. Co. v. Jackson*, 33 Alb. L. J., 239; *Lane's Appeal*, 34 Alb. L. J., 370. As to the form for the summons in the Clerk's books are evidence against the surety, see Sections 38 and 39, and notes thereto, and *Sinclair's D. C. Law*, 1885, 199-205.

(r) *Sinclair's D. C. Act*, 1879, 31.

The duties of the Clerk in regard to the issuing of the summons will be found here expressed, and at page 256 of *Sinclair's D. C. Act*, 1879, in the D. C. Rules.

A summons should not be issued by the Clerk where clearly the Court has no jurisdiction. It is no part of his duty to enter into questions of jurisdiction, but it would be his duty to see that the process of his Court is not used for improper purposes or in an illegal manner. Should a person, for instance, enter a suit against a defendant alleged to be living in the City of New York, a Clerk should not receive it nor issue the summons. A resident of a foreign jurisdiction cannot be sued in our Division Court: *Ontario Glass Co. v. Swartz*, 9 P. R., 252; *In re Guy v. G. T. Ry. Co.*, 10 P. R., 372. It may be that a defendant might waive the absence of jurisdiction created by non-residence by appearing and not raising the question. *In re Guy v. G. T. Ry. Co.*, 10 P. R., 372, but it is still questionable: *Hamlyn v. Bettelley*, 6 Q. B. D., 63, and especially at page 65, *per Selborne, L. C.*; *Direct Cable Co. v. Dom. Tel. Co.*, 28 Grant, 648, 667; *Ringland v. Lowndes*, 15 C. E. N. S., 173. If any Division Court had jurisdiction against one residing out of Ontario, the question would be different: *Re Mead v. Creary*, 32 C. P., 1; *Re Knight v. Medora*, 14 App. R., 112. See also Section 70 and notes.

The duties here imposed on the Clerk are imperative, and he is bound to perform them at the risk of *Mandamus*. *R. v. Fletcher*, 2 E. & B., 279; *In re Linden v. Buchanan*, 29 U. C. R., 1.

The summons here mentioned is for the purpose of giving the defendant an opportunity of being heard, which by right he is entitled to, unless by statutory enactment that right is expressly abridged. *Sinclair's D. C. Act*, 1879, 31, 127, 133, 141, 155, 209; *Sinclair's D. C. Law*, 1885, 108, 221; *R. v. Archbishop of Canterbury*, 1 E. & E., 545; *Tucker v. Collinson*, 16 Q. B. D.,

45. (s) The clerk shall cause a note of all summonses, all notices filed by any party to the action, orders, judgments, executions and returns thereto, to be from time to time fairly entered in a book to be kept in his office; and shall sign his name on every page of the book; and the signed entries, or a copy thereof certified as a true copy by the clerk, shall be admitted in all Courts and places as evidence of such entries, and of the proceedings referred to thereby, without further proof. R. S. O. 1877, c. 47, s. 37; 49 W. c. 15, s. 5.

Clerk to keep a record of writs and judgments.

562; *Re Merchants' Bank v. Van Allen*, 10 P. R., 348; *R. v. College of Physicians*, 44 U. C. R., 110; *Maxwell on Statutes*, 1st Ed., 325-330, and cases there cited.

Formerly the names of individual members of a firm had to be given as plaintiffs or defendants, (*Carte v. Macdonald*, 4 Ont. R. 310, and other cases cited at page 102 of *Sinclair's D. C. Law*, 1885; but this was altered by Section 21 of the D. C. Amendment Act, 1886; *Sinclair's D. C. Act*, 1886, 73, 74, and Section 108 of this Act.

The plaintiff should state his claim as pointed out by the Division Court practice, and not according to the practice of the High Court of Justice: See *Sinclair's D. C. Act*, 1879, 239, 240, 287-289; *Chitty's Forms*, 11th Ed., 110-112.

Particulars should be inserted *Sinclair's D. C. Act*, 1879, 239, but if defective on that ground, an amendment could be ordered, and, if necessary, the cause adjourned.

As to the abandonment of excess beyond the jurisdiction of the Court; in addition to the D. C. Rule on this subject, see *Sinclair's D. C. Act*, 1879, 240, and cases there cited; *In re Stogdale and Wilson*, 8 P. R., 5; *Vogt v. Boyle*, 8 P. R., 249; *Re Walsh v. Elliott*, 22 L. J. N. S., 387; *McLaughlin v. Schaefer*, 13 App. R., 258; *Apothecaries Co. v. Burt*, 1 L. M. & P., 405; *Brunskill v. Powell*, 1 L. M. & P., 550; *In re Higginbotham v. Moore*, 21 U. C. R., 326; *Meek v. Scobell*, 4 Ont. R., 351; *Ellis v. Fleming*, 1 C. P. D., 237-240; *Vines v. Arnold*, 8 C. B., 632.

(s) *Sinclair's D. C. Act*, 1879, 31, 32; *Sinclair's D. C. Act*, 1886, 11, 12.

It will be observed that this Section is a combination of two Sections of different Acts. The object is to have the Clerk not only cause a note of all summonses, orders, judgments, executions and returns thereto to be, from time to time, fairly entered in the Procedure Book; but also, all notices filed by any party to the action to be entered there.

Each page of the Procedure Book should be signed by the Clerk as directed by this Section. As soon as an entry is first made on each page, such page should be signed by the Clerk. The signed entries prescribed by this Section, or a certified copy thereof, shall be admitted in all courts and places as evidence of such entries and of the proceedings referred to thereby without further proof. This shows the necessity of the Clerk duly keeping his Procedure Book fully entered up at all times and of the same being signed. The Clerk's certificate

Clerks to issue executions, tax costs and keep account of fines, etc.

16. (t) The clerk shall also issue all warrants and writs of execution filled up and without blanks: he shall tax costs, subject to the revision of the Judge, register all orders and judgments of the court, and keep an account of all fines payable or paid into court, and of all suitors' moneys paid into and out of court, and shall enter an account of all such fines and moneys in a book to be kept by him for that purpose, which book shall be open to all persons desirous of searching the same, and shall at all times be accessible to the Judge and Inspector. R. S. O. 1877, c. 47, s. 38.

will be found at pages 31, 32 of Sinclair's D. C. Act, 1879, and among the Forms hereinafter given.

(t) Sinclair's D. C. Act, 1879, 32, 33, 171, 258, 327, 328, 338, 345.

As to costs in the Division Court it may be said that they are entirely in the discretion of the Judge, unless by a provision in this or some other Statute, other disposition is made of them. We also refer to Section 207 of this Act: It is the duty of the Clerk, under this Section, to tax all costs, and his duty in that respect cannot be interfered with, except on appeal to the Judge. The usual practice in cases of appeal is for the party dissatisfied with the taxation to give notice to the opposite party that he will, on a day named, bring the matter before the Judge on revision of taxation, and instruct the Clerk to send the necessary papers to the Judge for the purpose of such revision.

Of course the Judge could revise the costs on summons or appointment made by him.

The Clerk should exercise his best judgment on taxation and not leave for the Judge on revision that which he should properly do himself. *Simmons v. Storer*, 14 Ch. D., 154; *Hargreaves v. Scott*, 4 C. P. D., 21.

On the subject generally in Division Courts we also refer to Sinclair's D. C. Act, 1880, 117 and pages there cited: D. C. Law, 1884, 255 and 256 and pages there cited; D. C. Law, 1885, 289 and 290 and pages there cited and D. C. Act, 1886, 136 and pages there cited; L. R. Digest, 1880, 1118-1130; L. R. Digest, 1885, 433-438; 2 Mew's Digest, 1303-1402; R. & J., 788-833; Ont. Digest, 1884, 151-165; Ont. Digest, 1887, 130-143; Gray on Costs, 1-611; Lush's Pract., 1128-1131 and pages there cited; Arch. Pract., 12th Ed., 1827-1830 and pages there referred to.

We refer to the subject of Costs more fully, perhaps, than will be found necessary in Division Court practice; but we do so with a view of giving assistance to the reader in other courts as well.

Costs of the day.—Such costs that the opposite party may have been put to in preparing for trial, and which will be thrown away if the trial is put off, are "costs of the day:" *Walker v. Lawe*, 1 Gale, 52; *Attorney-General v. Hull*, 2 Dowl., 111. Such costs are usually in the discretion of the Judge: see generally *Parkinson v. Thompson*, 44 U. C. R., 29, R. & J., 800, 4396; *Hopkins v. Smith*, 9 P. R. 285, Ont. Digest, 1887, 130, 143; Gray on Costs, 371-374; Lush's Pract., 496; Arch. Pract., 12th Ed., 1491. A party can set

off costs of the day against costs in the cause on taxation: *Doe v. Carter*, 8 Bing., 330. If in the same cause, no application to the Court or Judge is necessary but in a different action it is: *Scott v. De Richebourg*, 20 L. J. N. S. 263 (English), per Maule, J., and per Patteson, J., in *Levy v. Drew*, 5 D. & L. 307; *Gray on Costs*, 516: but see *Griffin Ex parte, In re Adams*, 14 Ch. D. 37; *Wenham v. Fowle*, 2 Dowl., 441, 2 Mew's Digest, 1301-1402; *Ont. Digest*, 1884, 156.

Costs to abide the event.—The meaning of this term will be best expressed in the words of a standard author, who says:

"In some cases the Courts, on granting a new trial, have directed that the costs shall abide the event of the trial. As where the jury drew lots, and it happened that their verdict, decided in that manner, was in accordance with the evidence, and the opinion of the Judge: *Hale v. Cave*, 1 Str. 642; in one case where the jury cast lots, the Court granted a new trial, and ordered the jurymen to pay the costs on both sides; *Phillips v. Fowler, Barnes' Rep.* 441, referred to in *Norman v. Beaumont, Willes*, p. 488. So, also, where the rule is granted on the ground that the former verdict was obtained by fraud or perjured evidence: *Gillingham v. Stuart*, and *Tyson v. Willis*, cited in *Janes v. Whitbread*, 20 L. J. (N. S.), C. P. 220. In those cases the result of the second trial would depend upon whether fraud had been practiced or perjured witnesses brought forward on the first trial. If such was not the case, the same party who succeeded at first would be entitled to the costs of both trials: but if the allegation proved to be true, it is right he should not receive any costs: See observations of JERVIS, C. J., in *Janes v. Whitbread*, *supra*.

"Where the costs of the former trial are directed to abide the event of a new trial, if the same party succeeds on the new trial he has the costs of both trials, but the party who succeeds on a second trial, not having succeeded on the first, is entitled to the costs of the second trial only, and derives no benefit from the terms of the condition that the costs of the former trial shall abide the event, that being a condition in favor of the party against whom the rule for a new trial is granted: *Sherlock v. Barned*, 8 Bing. 21. If, therefore, the party who obtains the verdict on the first trial is defeated on the second, neither party is entitled to the costs of the first trial: *Austen v. Gibbs*, 8 T. R. 619; *Canham v. Fisk*, 2 C. & J. 126; *Chapman v. Partridge*, 2 New Rep. 382. Nor to the costs of the rule for the new trial: *Eccles v. Harper*, 14 M. & W. 248.

"Where a plaintiff, who has succeeded on the first trial, obtains a new trial on the ground of the smallness of the damages, the costs of the first trial being directed to abide the event, and on the second trial obtains only the same amount as on the former trial, he is only entitled to the costs of the last trial, neither party being entitled to the other: *Hudson v. Majoribanks*, 1 Bing. 392.

"And where, upon the defendant's obtaining a rule for a new trial after a verdict for the plaintiff, the costs being directed to abide the event, the plaintiff discontinued, it was held that the defendant was not entitled to the costs of the first trial; for the discontinuance of the suit by the plaintiff must be attended with the same consequences as to costs as if the event of the suit had been determined by the verdict of a jury. Now if the defendant upon a second trial had obtained a verdict, he would not have been entitled to the costs of the first trial, and therefore he could not be entitled to them on the discontinuance: *Howarth v. Samuel*, 1 B. & Ald. 566.

"The event which the costs are ordered to abide means the ultimate event of the cause. Where, therefore, the plaintiff having obtained a verdict on the first trial, a new trial was ordered, the costs to abide the event, and on the second trial there was a verdict for the defendant, which was also set aside, the rule on that occasion being silent as to the costs, and on the third trial the plaintiff obtained a verdict, it was held he was entitled to the costs of the first trial as well as of the last: *Meule v. Goddard*, 5 B. & Ald. 766.

"Where the result of a second trial is such as to give the successful party (under the rules already stated) the costs of both trials, no difficulty occurs, for he is of course entitled to the costs of the cause as well as of both trials; but where the successful party is only entitled to the costs of the last trial, and the general costs of the cause, a difficulty occurs sometimes in separating the costs of the first trial. The successful party is in such case entitled to such of the costs of the first trial as were available for the second, for they may be considered as costs in the cause, and therefore the Master may allow the costs of the briefs (if no fresh briefs are prepared), subpoenas (because they may be resealed), and copies (because they might be altered) on the first trial; but not the fees on the briefs, or the consultation fees, or the costs of serving the subpoenas for the first trial: *Lambert v. Lyddon*, 4 D. & L. 400; 16 L. J., Q. B. 34."—Gray on Costs, 384-386.

The "event" may be distributive in its operation: *Myers v. De Fries*, 5 Ex. D., 180.

We are of opinion that in Division Courts a Judge has no power to order a plaintiff who recovers a nominal sum to pay the defendant's costs. In England a Judge may, under the Judicature Act, and in certain cases, do so: *Harris v. Petherick*, 4 Q. B. D. 611. As to the principle on which costs are taxed where there is a counter-claim, see *Sinclair's D. C. Law*, 1884, 210-215, and cases cited there; 2 *Mew's Digest*, 1318, 1319. Where several defendants defend together, and some of them succeed, the latter are entitled to their proportion of costs incurred: *Griffiths v. Jones*, 4 Dowl., 159. It will be observed that in any action or proceeding not otherwise provided for, the costs thereof shall be paid or apportioned between the parties in such manner as the Judge thinks fit, and in default of any special direction, costs shall abide the event of the action: Section 207. In case of non-suit without special direction as to costs, a defendant would be entitled to his costs under this Section.

Costs in the cause.—Such costs as belong to the general proceedings in a cause are "costs in the cause": *Cameron v. Campbell*, 1 P. R., 170, 173; *Sinclair's D. C. Act*, 1879, 95, 191. Any proceeding of an exceptional or irregular character, costs should be provided for in the order made therein: *Idem*. See 2 *Mew's Digest*, 1373-1375; *Sinclair's D. C. Law*, 1885, 188. Costs of applications ordered to stand over until the trial, and costs reserved to be disposed of at the trial, should follow the event of the trial without any special directions: *Hodges v. Hodges*, 25 W. R., 162. Unless some Statute gives costs in such case no costs can be ordered to be paid in an *Ex parte* application: *Nokes v. Gibbon*, 26 L. J., Ch. 208; 3 Jur. N. S. 282, S. C. The Court has not (as a rule), any power after judgment to compel a person not a party to the suit to pay the taxed costs, even though he may be really the party interested in the decision of the suit: *Evans v. Rees*, 2 Q. B., 334; *Hayward v. Giffard*, 4 M. & W., 194; but, a Solicitor who, in order to induce a plaintiff to go on with the suit, agrees to indemnify him against the costs, thereby makes the suit his own, and becomes liable to pay the costs of the defendant: *Fielden v. N. Ry. Co. of Buenos Ayres*; *In re Jones*, L. R., 6 Ch., 497. As to the computation of double or treble costs when allowed: See *Staniland v. Ludlam*, 4 B. & C., 889; *Wilson v. River Dun N. Co.*, 5 M. & W., 89; *Thomas v. Saunders*, 1 A. & E., 552. A Judge cannot delegate to the Clerk the discretionary authority of allowing costs or upon any particular scale: *Corticene Floor Covering Co. v. Tull*, 27 W. R., 373.

When a question of principle is involved as to costs, an application for new trial will be entertained: *The City of Manchester*, 5 P. D., 221; *Yeo v. Tate*. "The Orient," L. R., 3 P. C., 696; See *Hartmont v. Foster*, 8 Q. B. D., 82; *Hornby v. Cardwell*, 8 Q. B. D., 329. A Judge has no power to order payment of costs as a penalty: *Willmott v. Barber*, 17 Ch. D., 772.

17. (u) The clerk of every Division Court shall, from time to time, as often as required so to do by the County Crown Attorney of his county, and at least once in every three months, deliver to him, verified by the affida-

Clerks to deliver to County Crown Attorney a verified account of fines.

An appeal lies where it is a question of principle on which costs are awarded: *Harpham v. Shacklock*, 19 Ch. D., 215; *Llanover v. Homfray*, 19 Ch. D., 232; *The City of Manchester*, 5 P. D., 221; *Yeo v. Tatem*. "The Orient," L. R., 3 P. C., 696; *Garnett v. Bradley*, 3 App. Cas., 944.

A hostile order as to costs should not be made *Ex parte*: *Lomax v. Berry*, 2 H. & N., 127; *Parsons v. Tinling*, 2 C. P. D., 119; *Field v. G. N. Ry. Co.*, 3 Ex. D., 261.

As to the meaning of "costs in the cause" further: See *Sinclair's D. C. Law*, 1885, 188.

Case beyond Jurisdiction.—Where formerly a case was beyond the jurisdiction of the Court it was doubtful if any order for costs could be made: *Sinclair's D. C. Act*, 1879, 45, 51, 179. That difficulty does not now exist, for by the sub-section to Section 207 it was removed by statutory enactment.

Security for Costs.—Security for costs can be obtained in the Division Court: See *Sinclair's D. C. Law*, 1884, 275 and pages there cited; *Sinclair's D. C. Law*, 1885, 312, 313 and pages there cited; *Re Fletcher and Noble*, 9 P. R., 255; See also *Pooley's Trustee in Bankruptcy v. Whetham*, 28 Ch. D., 38; *Ebrard v. Gassier*, 28 Ch. D., 232; *Farrer v. Lacy*, 28 Ch. D., 482; *Rourke v. White Moss Colliery Co.*, 1 C. P. D., 556.

In Interpleader: See *Tomlinson v. The Land and Finance Corporation, Limited*, 14 Q. B. D., 539; *In re Barber, Burgess v. Vinnicome*, Weekly Notes, 1886, 107; *Apollinaris Co. v. Wilson*, 31 Ch. D., 632; *Rhodes v. Dawson*, 16 Q. B. D., 548; *Cowell v. Taylor*, 31 Ch. D., 84.

When a married woman is ordered to give security for costs: Weekly Notes, 1887, 69. Security for costs may be ordered after expenses incurred: *In re Clough, Bradford Commercial Banking Co. v. Cure*, 35 Ch. D., 7.

Security for costs may be ordered in actions for penalties: R. S. O., —

On question generally: See *Budworth v. Bell*, 10 P. R., 544; *Arch. Pract.*, 12th Ed., 1902 and pages there cited; 5 *Mew's Digest*, 1777-1794; R. & J., 788-799, 4393; *Ont. Digest*, 1884, 153-156; *Ont. Digest*, 1887, 131-134.

Security will not be ordered where defendant has no defence: *Doer v. Rand*, 10 P. R., 165; *Anglo American Casings Co. (Limited) v. Rowlin*, 10 P. R., 391; *Sinclair's D. C. Law*, 1884, 92; *Sinclair's D. C. Law*, 1885, 151-156. One bondsman could be taken: *Re Fletcher v. Noble*, 9 P. R., 255. Probably a married woman would be rejected: *Mullin v. Pascoe*, 8 P. R., 372. On the subject generally see *Clark v. St. Catharines*, 10 P. R., 205; *Hately v. The Merchants' Despatch Transportation Co.* 10 P. R., 253; *Robertson v. Cowan*, 10 P. R., 568; *Re Rainy Lake Lumber Co.*, 22 L. J., N. S., 167; *Clark v. Rama Timber Transport Co.*, 20 L. J. N. S. 387.

A defendant out of the jurisdiction who sets up counter-claim is liable to give security for costs: *Sykes v. Sacerdoti*, 15 Q. B. D., 423; but a defendant asking relief against his co-defendant will not be so ordered to give security for costs: *Walmsley v. Griffith*, 21 L. J., N. S., 401. If surety becomes worthless, a new one may be ordered: *Gage v. Can. Pub. Co.* 10 P. R., 169; See also *La Grange v. McAndrew*, 4 Q. B. D., 210.

(u) *Sinclair's D. C. Act*, 1879, 33.

vit of the clerk sworn before the Judge or a Justice of the Peace of the county, a full account in writing of all fines levied by the court, accounting for and deducting the reasonable expenses of levying the same, and any allowance which the Judge may make out of such fine, in pursuance of the power hereinafter given. R. S. O. 1877, c. 47, s. 40.

Clerks
to furnish
Judge
with a
verified
account
of moneys
paid in
and out
of Court

48. (v) The clerk of every Division Court, when required by the Judge, shall, from time to time, furnish him with a full account, in writing, verified by the oath of the clerk, sworn before the Judge or a Justice of the Peace, of the moneys received into and paid out of the court by any suitors or other parties under any orders, judgments or process of the court, and of the balance in court belonging to any such suitors or parties. R. S. O. 1877, c. 47, s. 41.

Clerk an-
nually to
make list
of suitors'
money in
Court.

49. (w) (1) The clerk of every Division Court shall, annually in the month of January, make out a correct list of all sums of money belonging to suitors in the court, which have been paid into court and have remained unclaimed for six years before the last day of the month of December then last past, specifying the names of the parties for whom or on whose account the same were so paid.

Copy of
list to be
put up in
court
room and
in Clerk's
office.

(2) A copy of such list shall be put up and remain at all times in the clerk's office and, during court hours, in some conspicuous part of the court house, or place where the court is held. R. S. O. 1877, c. 47, s. 43.

[As to return of fees by Division Court Clerk, see cap. 15, ss. 28, 29.]

(v) Sinclair's D. C. Act, 1879, 33, 34.

(w) Sinclair's D. C. Act, 1879, 34.

*Disposal of Books and Papers when
Clerk changed.*

50. (x) (1) All accounts, moneys, books, papers, and other matters in the possession of the clerk by virtue of or appertaining to his office shall, upon his resignation, removal or death immediately become the property of the County Crown Attorney of the county in which the division is situate, who shall hold the same for the benefit of the public until the appointment of another clerk, to whom he shall deliver over the same, but not until such clerk and his sureties have executed and filed the covenant hereinbefore mentioned. R. S. O. 1877, c. 47, s. 44.

Upon resignation, removal or death of Clerk, County Crown Attorney to become possessed of papers.

(2) No person shall wrongfully hold or get possession of such accounts, moneys, books, papers and matters aforesaid, or any of them; and upon the declaration in writing of the Judge presiding over the Division Court for the time being, that a person has obtained or holds such wrongful possession thereof, and upon the order of a Judge of the High Court, founded thereon, such person shall be arrested by the sheriff of any county in which he is found, and shall by such sheriff be committed to the common gaol of his county, there to remain, without bail until the High Court, or a Judge thereof, is satisfied that such person has not and never had nor held any such

Punishment of person wrongfully holding moneys, books or papers.

x) Sinclair's D. C. Act, 1879, 34, 35.

The sub-section to this Section has been taken from Section 48 of the Division Court Act, to be found as Chapter 19 of what was the Consolidated Statutes of Upper Canada. This is a quasi-criminal proceeding, and in the revision of the Statutes it will be observed that difficulty must have been experienced in moulding the clause so as to bring it within the authority of the Provincial Legislature. If *ultra vires*, the original Section would remain in force.

matters or moneys, or that he has fully accounted for or delivered up the same to the County Crown Attorney, or until he be otherwise discharged by due course of law. C. S. U. C. c. 19, s. 48.

Duties of Bailiffs.

Bailiffs
to serve
writs.

51. (y) The bailiffs shall serve and execute all summonses, orders, warrants, and writs delivered to them by the clerk for service,

(y) Sinclair's D. C. Act, 1879, 35-37.

On a Bailiff's duties and liabilities generally: See D. C. Act, 1880, 115 and pages cited; D. C. Law, 1884, 252 and pages cited; D. C. Law, 1885, 287 and pages cited.

For a discussion of Bailiff's fees: See D. C. Act, 1879, 337, 343-345; D. C. Act, 1886, 115-129, and later pages of this work.

The impropriety of Bailiffs being canvassers in political elections cannot be too strongly condemned. The public interests will be best subserved by Bailiffs not taking an active interest in election contests and by not exhibiting an "obnoxious partizanship."

In the North Victoria Case, 1 Hodgins' Election Cases, 612, MORRISON, J., says at page 616 of the report: "With reference to the McGillivrays' case. It is evident that the McGillivrays were in the hands of the Bailiff from time to time, and very probably they supposed McSwain had the Taylor execution when he called with Boadway and asked how the McGillivrays intended voting, and finding that McSwain and his companion were canvassing for the respondent, they thought it better not to vote, not because any undue influence in fact was used, but upon the expectation that they would receive further favors from the Bailiff by adopting that course. I don't hesitate to say that it is a highly improper act for the Bailiff to canvass parties against whom he had an execution; I will further add, canvassing at all. We all know that persons in the station of life of the McGillivrays, when in pecuniary difficulties, may be strongly influenced by a Bailiff without anything being said, except how they are going to vote; and the Legislature would do well to prohibit canvassing by Division Court Bailiffs."

Every good citizen will, we think, approve of the admonitory language of the learned Judge.

Neither should a Bailiff pursue too rigid or too lax a course in the performance of his duty. He will best consult the interests of suitors and observe his duty most who quietly but firmly performs his unpleasant work, not with an oppressive hand, but in a kindly and becoming manner, neither courting the favor of the creditor nor exciting the ill-will of the unfortunate debtor. Reasonable forbearance will frequently be the means of obtaining a debt, while harshness and severity will often produce a fruitless execution.

Bailiffs cannot be too careful in seeing that their executions are promptly executed and returned. There is no change in the law in this respect, the only change being that when an execution is renewed (as it can only be at the instance of the execution creditor) it must now be renewed for *six months*, instead of thirty days as formerly.

whether bailiffs of the court out of which the same issued or not, and shall so soon as served return the same to the clerk of the court of which they are respectively bailiffs; but, subject to the provisions of section 82, they shall not be required to travel beyond the limits of their division, or be allowed to charge mileage for any distance travelled beyond the limits of the county in which the court of which they are respectively bailiffs is situated. R. S. O. 1877, c. 47, s. 45.

52. (z) Every bailiff shall exercise the authority of a constable during the actual holding of the court of which he is a bailiff, with full power to prevent breaches of the peace, riots or disturbances within the court-room or building in which the court is held, or in the public streets, squares, or other places within the hearing of the court, and may, with or without warrant, arrest all parties offending against the meaning of this clause, and forthwith bring the offenders before the nearest Justice of the Peace, or any other judicial

Bailiff to exercise duty of constable during holding of Court.

(z) Sinclair's D. C. Act, 1879, 37, 38.

As to what are "streets, squares or other places" within this Section, see *Nutter v. The Accrington Local Board of Health*, 4 Q. B. D., 375; *R. v. Wellard*, 14 Q. B. D., 63; *Attorney-General v. Toronto*, 10 Grant, 43.

A bailiff has the authority of a Constable in the performance of his duty under this Section, but no greater authority.

The power of a constable to apprehend and detain offenders is much greater than that of private persons. They may exercise all the powers of the latter and their right to apprehend persons indicted for felony is undoubted: 1 East P. C., 298-300. Constables can do that which private persons cannot do, apprehend persons on a reasonable suspicion of felony: *Samuel v. Payne*, Douglas 359, 1 East P. C., 301; 2 Hale P. C., 83, 84, 89. It has always been considered that a charge of felony made by a person not manifestly unworthy of credit is sufficient to justify the apprehension: 1 East P. C., 302. The peace officer should always make such inquiries as teaches him are best suited to ascertain the nature of the offence.

Whether a constable is justified in arresting a person *after* a breach of the peace has been committed is a point which has occasioned some doubt. There

officer having power to investigate the matter or to adjudicate thereupon. R. S. O. 1877, c. 47, s. 46.

are indeed some authorities to the effect that the officer may arrest the party on the charge of another, though the affray is over, for the purpose of bringing him before a justice to find security for his appearance: 2 Hale P. C., 90; Hancock v. Sandham; Williams v. Dempsey, 1 East P. C., 306 (n). The better opinion was always said to be the other way: 1 East P. C., 305; Hawkins' Book 2, Chap. 12, S. 20; 1 Russell by Greaves, 601; Timothy v. Simpson, 1 C. M. & R., 757; R. v. Walker, 1 Dears. C. C., 358; R. v. Marsden, L. R. 1 C. C., 131; Baynes v. Brewster, 11 L. J. M. C., 5; R. v. Turberfield, L. & C., 495; Rogers v. Van Valkenburgh, 20 U. C. R., 218 and 220; Belch v. Arnott, L. R. Digest, 1887, 83.

Private persons are sometimes bound to give aid and assistance to a peace officer, and are liable to indictment if they refuse: R. v. Sherlock, L. R., 1 C. C., 20. And if they assist they are protected equally with the constable who is making the arrest: Pollock on Torts, 101, 102. The principle which runs through common law and legislation in the matter is that an officer is not protected from the ordinary consequence of unwarranted acts, which it rested with himself to avoid, such as using needless violence to secure a prisoner; but he is protected if he has only acted in a manner in itself reasonable, and where a warrant is necessary in execution of an apparently regular warrant or order, which on the face of it he was bound to obey: Mayor of London v. Cox, L. R. 2 H. L., at page 269.

The law appears to be the same in the United States: Cooley on Torts, 459-462.

Where an order of a court or a warrant is issued by a court or person that has no jurisdiction at all, any constable acting under its assumed authority is not protected: The Marshalsea, 10 Coke, R. 76a; Clark v. Woods, 2 Exch. 395.

A constable or officer acting under a Justice's warrant is protected by Statute, notwithstanding any defect of jurisdiction, if he produces the warrant on demand. The action only lies if a demand in writing for perusal and copy of the warrant is refused or neglected for six days. See Sections 235, 286, hereto.

A constable is not excused if he arrest the wrong person. He must lay hands on the right person at his peril, the only exception being on the principle of estoppel, where he is misled by the party's own act: Glasspoole v. Young, 9 B. & C., 696; Dunston v. Paterson, 2 C. B. N. S., 495; 6 Mew's Digest, 1108-1123 and cases there cited; Pollock on Torts, 73-83.

On the question of authority and liability of a constable generally under the decisions of our own courts, see Price v. Sullivan, 6 O. S., 640; Trigerson v. Board of Police of Cobourg, 6 O. S., 405; Ross v. Webster, 5 U. C. R., 570; Brown v. Shea, 5 U. C. R., 141; Arnott v. Bradley, 23 C. P., 1; Fido v. Wood, 5 O. S., 558; Oviatt v. Bell 1 U. C. R., 18; Jones v. Ross, 3 U. C. R., 328; Beamer v. Darling, 4 U. C. R., 211; Belch v. Arnott, 9 C. P., 68; Kalar v. Cornwall, 8 U. C. R., 168; Delany v. Moore, 9 U. C. R., 294; R. & J., 695-698.

As to the general authority of a Bailiff of a Division Court, see also R. & J., 1098, *Et seq.*, on the general authority and liability of constables; see Danforth's (U. S.) Digest, 682-684, title "Marshal"; 5 Mew's Digest, 1387-1395; Pollock on Torts, 101-103, 122-271.

Fees of Clerks and Bailiffs, etc.

53. (a) (1) The clerks and bailiffs shall be paid by fees, as provided and allowed by the general rules or orders applicable to Division Courts, heretofore in force or hereafter to be made by the Board of County Judges, and approved under the provisions of section 297 of this Act.

Clerks and bailiffs to be paid by fees.

(2) Until otherwise provided by the general rules or orders, the fees to be taken and received by appraisers shall be as follows:

Fees of appraisers.

To each appraiser, during the time actually employed in appraising goods (to be paid in first instance by the plaintiff and allowed in costs of the cause) Fifty cents per day.

R. S. O. 1877, c. 47, s. 47.

(3) A table of the fees shall be hung up in some conspicuous place in the offices of the several clerks. R. S. O. 1877, c. 47, s. 48.

Table of fees to be hung up in clerk's office.

54. (b) The fees upon every proceeding shall, on or before such proceeding, be paid in the first instance by the plaintiff, or other party at whose instance the proceeding takes place. R. S. O. 1877, c. 47, s. 49.

Fees to be paid by plaintiff or defendant in first instance.

(a) Sinclair's D. C. Act, 1879, 38, 39.

The table of fees to be received by Clerks and Bailiffs will be found appended hereto, and the discussion of most items therein will be found at pages 336-345 of Sinclair's D. C. Act, 1879, and at pages 103-129 of the D. C. Act, 1886. Neither officer can receive any greater or other fee than that allowed by the table of fees for service performed by him as such: Sinclair's D. C. Law, 1885, 275. A copy of the table of fees should not only be hung up in the Clerk's office under sub-section 3 of this Section, but should be kept so hung up and exposed to the public.

(b) Sinclair's D. C. Act, 1879, 39, 40.

It will be observed that a Clerk or Bailiff is not obliged to act until his fees are paid in the first instance by the person at whose instance the proceedings take place: Sinclair's D. C. Act, 1886, 119; Goodman v. Robinson, 18 Q. B. D. 332. This would include a "proceeding" as well before judgment as after: Ross v. Farewell, 5 C. P., 101. See Meloche v. Reaume, 34 U. C. R., 606; Caspar v. Keachie, 41 U. C. R., 599.

How
enforced.

55. (c) If the fees are not paid in the first instance by the plaintiff or party on whose behalf such proceeding is to be had, the payment thereof may, by order of the Judge, be enforced by execution in like manner as a judgment of the court, by such ways and means as any debt or damages ordered to be paid by the court can be recovered. R. S. O. 1877, c. 47, s. 50.

Bailiff's
fees to be
paid to
clerk
before
execution
issues.

56. (d) At the time of the issue of the execution, the bailiff's fees thereon shall be paid to the clerk, and shall by him be paid over to the bailiff, upon the return of the execution, and not before, but if the bailiff does not become entitled to any part, or becomes entitled to a part only, of such fees, the whole or surplus shall on demand be by the clerk repaid to the plaintiff or party from whom the fees were received. R. S. O. 1877, c. 47, s. 51.

Bailiff to
forfeit
fees if he
neglects
to return
writ.

57. (e) If the bailiff neglects to return any process or execution within the time required by law, he shall for each such neglect forfeit

(c) Sinclair's D. C. Act, 1879, 40, 41.

The proceeding under this Section does not appear to be within the prohibition contained in Section 88 of this Act against Clerks or Bailiffs suing in their own Courts. It is not "bringing any action in the Division of which he is Clerk or Bailiff" within the latter part of that Section to take this statutory mode of collecting costs.

(d) Sinclair's D. C. Act, 1879, 41.

In an action against a Bailiff and his surety for not returning an execution within the proper time, it is no answer, after the Bailiff received the execution without exacting prepayment of his fees, to set up the non-payment in defence of the action: *Bank of Ottawa v. Smith*, 16 L. J., N. S., 223.

(e) Sinclair's D. C. Act, 1879, 41, 42.

We have only to reiterate the opinion previously expressed, that Bailiffs should be vigilant in making return to process or execution within the proper time, and that where it is not done the forfeiture of fees should be exacted by the Clerk. The latter may endanger his position by a disregard of his duty in that respect.

his fees thereon, and all fees so forfeited shall be held to have been received by the clerk, who shall keep a special account thereof, and account for and pay over the same to the County Crown Attorney, to be paid by him over to the Provincial Treasurer, to form part of the Consolidated Revenue Fund. R. S. O. 1877, c. 47, s. 52.

58. (f) No clerk or bailiff shall directly or indirectly take or receive any commission, charge, expenses, fee, or reward for or in connection with the collection of any debt or claim which has been or may or can be sued in the court for which he is so clerk or bailiff, except such fees as are provided by any tariff of fees under this Act. 43 V. c. 8, s. 37.

Clerk or bailiff not to collect on commission.

59. (g) (1) Every Division Court Clerk shall be entitled to retain to his own use in each year all the fees and emoluments earned by him in that year up to \$1,000 ;

Fees to be retained by clerks for their own use.

(f) Sinclair's D. C. Act, 1880, 66, 67.

In addition to what has been said on this Section we may say that the object of the Legislature evidently has been to prohibit Clerks and Bailiffs from being collectors of debts ; in fact, that neither officer should be allowed to exercise that influence with debtors which his position as Clerk or Bailiff gave him. It was found that a Clerk or Bailiff often did what is termed a " thriving business " as collector of debts, to the prejudice frequently of each other or some other person. It was found, too, that a Division Court officer who was interested beyond the due performance of his duty in a suit in Court was not one of whom impartiality might be expected in such cases.

Any moneys received by a Clerk or Bailiff contrary to this Section would be recoverable back by the person who paid it : *Haldimand v. Martin*, 19 U. C. R., 178.

(g) Sinclair's D. C. Act, 1880, 67, 68.

We have again to express the doubt previously expressed as to the meaning of the word " earned " used in this Section. Does it mean net or gross earnings ? Is the Clerk justified in first deducting from his gross receipts for fees as Clerk such necessary disbursements as office rent, fire, light, cost of office books, etc., or is he obliged to make his return on gross receipts ? The latter is the view which Government has taken, but whether correct or not is a question still open. We refer to the following cases bearing on the subject : *McCargar v. McKinnon*, 15 Grant, 361 ; *Lawless v. Sullivan*, 6 App. Cas., 373 ; *Ashworth v. Outram*, 5 Ch. D., 923 ; *Lovell v. Newton*, 4 C. P. D., 7 ; *Workman v. Robb*, 7 App. R., 889 ; *Mersey Docks Board v. Lucas*, 8 App. Cas., 891.

(2) Of the further fees and emoluments earned by every Division Court Clerk in each year in excess of \$1,000, and not exceeding \$1,500, he shall be entitled to retain to his own use 90 per cent., and no more ;

(3) Of the further fees and emoluments earned by every Division Court Clerk in each year in excess of \$1,500, and not exceeding \$2,000, he shall be entitled to retain to his own use 80 per cent., and no more :

(4) Of the further fees and emoluments earned by every Division Court Clerk in each year in excess of \$2,000, and not exceeding \$2,500, he shall be entitled to retain to his own use 70 per cent., and no more :

(5) Of the further fees and emoluments earned by every Division Court Clerk in each year in excess of \$2,500, and not exceeding \$3,000, he shall be entitled to retain to his own use 60 per cent., and no more :

(6) Of the further fees and emoluments earned by every Division Court Clerk in each year in excess of \$3,000, he shall be entitled to retain to his own use 50 per cent., and no more.
43 V. c. 8, s. 39.

Clerk to
pay ex-
cess to
Treasurer
of Prov-
ince.

60. (h) On the 15th day of January in every year every Division Court Clerk shall transmit to the Treasurer of the Province a duplicate of the return required by section 68 of this Act, and shall also pay to such Treasurer for the use of the Province such proportion of the fees and emoluments

(h) Sinclair's D. C. Act, 1880, 68.

We have only further to urge upon Clerks throughout the Province the necessity for promptness in making this return and the payment to the Provincial Treasurer of the amount, if any, payable.

earned by him during the preceding year, as under this Act he is not entitled to retain to his own use. 43 V. c. 8, s. 40.

INSPECTOR.

61. (i) The Lieutenant-Governor may, from time to time, appoint an inspector of Division Courts, who shall hold office during pleasure, and whose duty shall be :

Appointment of inspector.

1. To make a personal inspection of every Division Court and of the books and court papers belonging thereto ;

Inspection of offices.

2. To see that the proper books are provided, that they are in good order and condition, that the proper entries and records are made therein in a proper manner, at proper times, and in a proper form and order, and that the court papers and documents are properly classified and preserved ;

Books, etc.

3. To ascertain that the duties of the officers of the Division Courts are duly and efficiently performed, and that the office is at all times duly attended to by the clerk ;

Officers' duties.

4. To see that lawful fees only are taxed or allowed as costs ;

Lawful fees.

5. When directed so to do by the Lieutenant-Governor, to ascertain that proper security has been given by any clerk or bailiff, and that the sureties continue sufficient ;

Security by clerks and bailiffs.

(i) Sinclair's D. C. Act, 1880, 69.

The important duties imposed on the Inspector are sufficiently pointed out by this Section so as to render any further remarks thereupon unnecessary beyond this, that Clerks should, at all times, keep their offices in such a state that they need not fear a visit of the Inspector at any time. To this officer's efficiency, more than the oversight of the Judge, must depend the safety of the public interests. Many things may pass the observation of a Judge unnoticed, which cannot escape the eye of a practised Inspector. It is difficult to see how one Inspector can do the work prescribed by this Section, and we suggest a more frequent inspection, which may necessitate assistance to the present efficient officer.

Report to
the
Lieuten-
ant Gov-
ernor.

6. To report upon all such matters as expeditiously as may be to the Lieutenant-Governor for his information and decision. 43 V. c. 8, s. 23.

Power of
inspector
in making
inquiry
into con-
duct of
officers.

62. (j) When the inspector considers it expedient to institute an inquiry into the conduct of a Division Court clerk or bailiff in relation to his or their official duties or acts, it shall be lawful for the inspector to require the clerk or bailiff, or other person or persons, to give evidence on oath, and for this purpose the inspector shall have the same power to summon such officers, or other person or persons, to attend as witnesses, to enforce their attendance, and to compel them to produce books and documents, and to give evidence, as any Court has in civil cases. 43 V. c. 8, s. 24; 48 V. c. 14, s. 13.

Books,
etc., to be
produced
for in-
spection.

63. (k) The Division Court clerks and bailiffs shall, as often as required by the inspector, produce all books and documents required to be kept by them, or that may hereafter be required to be kept by them, at the clerk's office, for examination and inspection: every clerk or bailiff shall report to the inspector such matters relating to any cause or proceeding as the inspector shall require. 43 V. c. 8, s. 26.

(j) Sinclair's D. C. Act, 1880, 61, and D. C. Law, 1885, 223, 224.

There is no preliminary requirement necessary before the Inspector makes this inquiry. Whenever he may deem it "expedient," the inquiry can be made by him and the officers and all parties can be summoned to give evidence before him.

(k) Sinclair's D. C. Act, 1880, 61, 62.

The refusal or neglect to produce the books and documents which this Section enjoins of the Clerk or Bailiff might prove a serious matter to them. The fullest information should therefore be given by the officers, and due production of "all books and documents" made to the Inspector by them.

64. (l) It shall be the duty of every Division Court clerk or bailiff, within five days after his appointment to office, to inform the inspector of his appointment, his full name and post office address, the names of his sureties, their respective callings or professions, places of residence, and post office address. 43 V. c. 8, s. 27.

Officers to inform inspector of their appointment, etc.

65. (m) When a clerk or bailiff has given new sureties, as required by this Act, he shall immediately inform the inspector of such change, giving the names of the sureties, their respective callings or professions, places of residence, and post office address. 43 V. c. 8, s. 28.

Inspector to be informed of new sureties.

66. (n) Every Division Court clerk and bailiff shall have and keep in his possession or custody the certificate of the Clerk of the Peace named in section 36 of this Act, and shall produce the same for the information of the inspector when required so to do. 43 V. c. 8, s. 29.

Officers to produce certificate of filing covenant, etc.

67. (o) Every clerk shall, on or before the 15th day of January in each year, make a return of the business of his office for the year ending the 31st day of December preceding, in such form and manner as the Lieutenant-Governor shall direct. 43 V. c. 8, s. 30.

Returns.

(l) Sinclair's D. C. Act, 1880, 62.

(m) Sinclair's D. C. Act, 1880, 62, 63.

(n) Sinclair's D. C. Act, 1880, 63.

(o) Sinclair's D. C. Act, 1880, 63, 64.

The mailing of the return within the prescribed time would, as has been already remarked in the above work and page, be sufficient: *Byrne v. Van Tienhoven*, 5 C. P. D., 344; *Nasmith v. Manning*, 5 App. R., 126; *Marshall v. Jamieson*, 42 U. C. R., 115; *Bruce v. Tolton*, 4 App. R. 144; *In re Imperial Land Co. of Marseilles*, L. R. 15 Eq. 18.

Clerks
to make
returns to
inspector.

68. (p) Every clerk and bailiff shall keep a separate book in which he shall enter from day to day all fees, charges and emoluments received by him by virtue of his office, and shall on the 15th day of January, in every year, make up to and including the 31st day of December of the previous year, a return to the inspector, under oath, shewing the aggregate amount of fees, charges and emoluments so received by him and which he has become entitled to receive, and has not received, during the year. 43 V. c. 8, s. 31.

JURISDICTION.

Cases in
which
Court has
no juris-
diction.

69. (q) The Division Courts shall not have jurisdiction in any of the following cases :

1. Actions for any gambling debt ;
2. Actions for spirituous or malt liquors drunk in a tavern or alehouse ;
3. Actions on notes of hand given wholly or partly in consideration of a gambling debt or for such liquors ;
4. Actions for the recovery of land or actions in which the right or title to any corporeal or incorporeal hereditaments, or any toll, custom or franchise comes in question ;
5. Actions in which the validity of any devise, bequest or limitation under any will or settlement is disputed ;

(p) Sinclair's D. C. Act, 1880, 64.

The necessity for keeping this book closely written up, containing the requirements of the Act, cannot be too strongly impressed upon the minds of Clerks.

(q) Sinclair's D. C. Act, 1879, 42-52, D. C. Act, 1880, 120, 121, and pages there cited ; D. C. Law, 1884, 268, 269, D. C. Law, 1885, 300, 301, and pages there cited ; D. C. Act, 1886, 143, and pages there cited.

Jurisdiction of the Court.—This Section was formerly the 53rd Section of the Division Courts Act. When writing his first work on Division Courts, many

6. Actions for malicious prosecution, libel, slander, criminal conversation, seduction or breach of promise of marriage ;

7. Actions against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto. R. S. O. 1877, c. 47, s. 53.

cases escaped the notice of the writer on this subject, and many have been decided since. These will now form the subject of the following pages on the question of jurisdiction.

The fact of a Bailiff having, in taking goods under process from the Court, acted under an indemnity from the Execution Creditor, does not deprive him of the protection which the Statute gives, entitling him to a notice of action for anything done by him in pursuance of the Act: *White v. Morris*, 11 C. B., 1015.

A warrant, good on its face, will protect a Bailiff in a civil or criminal proceeding: *R. v. Davis*, L. & C., 64; *R. v. Briggs*, 47 J. P., 615.

The fact of one item in a tradesman's bill being separated from the rest by an interval of several years does not prevent its being sued as one cause of action: *Copeman v. Hart*, 14 C. B. N. S., 731.

In the case of *Barnes v. Marshall*, 18 Q. B., 785, it was held, that in a contract for carrying timber by barge, from one place to another, that a charge for hauling by horses part of the way formed part of the entire contract, and could not be sued for in the English County Courts separately.

By the English County Courts Act of 30 and 31 Vict., Cap. 142, it is enacted that an action may be brought "in the District (Division) of which the cause of action wholly or in part arose," on a Bill of Exchange. It was held that an action could be brought in the district in which the bill was drawn: *Trevor v. Wilkinson*, 31 L. T. N. S., 731. We have no such provision in our Division Courts Act. A statute is necessary to enable its being done: *Wilde v. Sheridan*, 16 Jur., 426; *Betteley v. Buck*, 13 Jur., 368.

In the case of *In re Fuller*, 2 E. & B., 573, it was held, in an action by an administrator, for a cause of action after death of intestate, that the grant of letters of administration formed a necessary part of the cause of action. But see *Re McCallum v. Gracey*, 10 P. R., 514.

A man may have two dwellings so as to render him suable in either Division: *Macdougall v. Paterson*, 11 C. B., 755; *Butler v. Ablewhite*, 6 C. B. N. S. 740; *Kerr v. Haynes*, 29 L. J. Q. B., 70; *Bailey v. Bryant*, 1 E. & E., 340.

It is no objection to the jurisdiction that the plaintiff has become resident within the division for the very purpose of giving jurisdiction; provided, that the residence was actual and *bona fide* and not colorably and collusively acquired before issuing the summons: *Massey v. Burton*, 2 H. & N. 597; *Baker v. Wait*, L. R. 9, Eq. 103; *Sinclair's D. C. Law*, 1885, 31, 32.

It is submitted that a summons issued under the 83rd Section hereof, need not state that it is issued by leave: *Waters v. Handley*, 6 D. & L., 88. As to effect of not getting leave, see *Brown v. London & N. W. Ry. Co.*, 4 B. & S., 326.

Where the time of bringing an action is limited by Statute, a suit must be commenced within the prescribed time: *Tottenham Local Board of Health v. Rowell*, 1 Ex. D., 514. The time could not, without Statutory power, be extended.

A local Act in England, passed before the County Courts Act, declared that

rates for cleansing and sewerage a town might be recovered "in any of Her Majesty's Courts of record at Westminster;" it was held, that the County Court had a right to entertain a case for the recovery of such rates to an amount within its jurisdiction: *Stewart v. Jones*, 1 E. & B., 22.

Where a statute prescribes that some preliminary dispute has to be settled by a certain tribunal before suit in the Division Court, such must be first done as a condition of suit: *New River Co. v. Mather*, L. R. 10, C. P. 442.

An employee was discharged for neglecting his work, and the employers refused to pay him wages in lieu of notice. He sued in an English County Court. At the hearing no set-off or counter-claim was set up, but evidence was produced to shew that he had been guilty of negligence. A verdict was found in the employers' favor. Held, that the employers were not precluded from preferring a claim before justices against him for wrongfully and negligently damaging their materials, under the Employers' and Workmen Act (38 and 39 Vict. c. 90), for the only matter decided in the County Court was whether there was such negligence on his part as would justify his dismissal without notice: *Hindley v. Haslam*, 3 Q. B. D., 481.

Where a Justice of the Peace has jurisdiction to entertain a claim for wages, has done so and adjudicated upon such and dismissed it, the claim cannot then be sued in the Division Court: *Millet v. Coleman*, *Dawson v. Coleman*, 33 L. T. N. S., 204.

Where a rule of a Building Society is that all disputes by members against the Society shall be settled by arbitration, it was held that the right to bring an action was taken away: *Ex parte Payne*, 5 D. & L., 679.

Two claims, one for salary and the other for money lent, can be sued separately and do not form one cause of action, in contravention of the Statute as to splitting demands: *Richards v. Marten*, 23 W. R., 93.

The expression, "cause of action," means in general "cause of one action": *Grimby v. Aykroyd*, 1 Ex., 479; *Sinclair's D. C. Act*, 1879, 79.

The abandonment of excess above the jurisdiction must, in order to give the Court jurisdiction, be the act of the plaintiff himself or some person authorized by him, and not the act of the Judge: *Hill v. Swift*, 10 Ex., 726. And when a Judge, of his own authority and without the consent of the plaintiff, amended the particulars so as to bring the case within the jurisdiction, a Prohibition was issued: *Idem*.

The words "balance of account" are not limited where the parties have met and settled the account, but they include a debt reduced below the jurisdictional amount by payment on account: *Turner v. Berry*, 5 Ex., 858.

It need scarcely be said that a debt proved as originally within the jurisdiction of the Court, the claim being the outside limit, is within the jurisdiction when reduced by payment: *Hudspeth v. Yarnold*, 9 C. B., 625; *Slaley v. Kirby*, 9 M. & W., 536.

Where a claim is clearly within the jurisdiction of the Court, Prohibition will not lie: *Edwards v. Rogers*, 1 L. M. & P., 196.

The jurisdiction of a Division Court is not ousted by the pendency of another action for the same cause in a Superior Court: *McMurray v. Wright*, 11 W. R., 34; *Williamson v. Bissell*, 7 H. & N., 391.

Where a claim as sued is within the jurisdiction of a Division Court, evidence of the plaintiff's damage being beyond the jurisdiction of the Court does not oust the plaintiff's right in that Court: *Boeger v. Nicholls*, 28 L. T. N. S., 441.

It is said that the Division Court can try cases of detinue: *Taylor v. Addyman*, 13 C. B., 309; *Sinclair's D. C. Act*, 1879, 63. Money may probably be

paid into Court in that form of action: *Idem*. See *Crossfield v. Such*, 8 Ex., 159; *Leader v. Rhys*, 10 C. B. N. S., 369.

If the evidence shows a case beyond the jurisdiction though sued in a form within the jurisdiction, the authority of the Division Court ceases: *Austin v. Dowling*, L. R., 5 C. P., 534.

"If he (the Judge) has no jurisdiction, he can neither amend nor adjourn, nor do anything else; it is *coram non judice*": *per MAULE, J.*, in *Taylor v. Addyman*, 13 C. B., 316.

Where it is necessary for a Judge to form an estimate of value in order to give him jurisdiction, if he adopts an erroneous test of value Prohibition will be granted against him: *Elston v. Rose*, L. R., 4 Q. B., 4.

If a Judge has a discretion to exercise as to value, and has exercised it honestly, Prohibition will not lie to shew that he was wrong: *Symons v. Rees*, 1 Ex. D., 416.

As to ousting the jurisdiction of the Court by setting up title to land: See *Emery v. Barnett*, 4 C. B. N. S., 423; *Pearson v. Glazebrook*, L. R., 3 Ex., 27; R. & J., 1099; Ont. Digest, 1884, 214; Ont. Digest 1887, 198; 2 Mew's Digest, 1436.

A defendant does not admit the jurisdiction by appearing to object to the jurisdiction of the Court: *Fearon v. Norvall*, 5 D. & L., 439.

The Judge has power to inquire into the fact whether or not the title to land is in question, and is not bound to take the statement of either party on that subject: *Thomson v. Ingham*, 14 Q. B., 710; *Lilley v. Harvey*, 5 D. & L., 648. If title is *bona fide* brought in question, he should stop: *Lawford v. Partridge*, 1 H. & N., 621; *Lloyd v. Jones*, 6 C. B., 81.

Where a defendant is let in to defend, he is not confined to the defence disclosed in his application, but may make any other defence that he could have made originally: *Saul v. Jones*, 1 E. & E., 59.

A party who wants to claim damages in an Interpleader suit must do so at once, under Section 269, and cannot claim them after adjudication of the Interpleader issue: *Death v. Harrison*, L. R., 6 Ex., 15. See also *Mercer v. Stanbury*, 25 L. J. Ex. 346.

Where judgment had been given on an Interpleader issue, and the Court of Appeal reversed it, it was held that that part relating to costs was reversed, too: *Gage v. Collins*, L. R., 2 C. P., 381.

Chief Justice WILSON decided, in *Fox v. Symington*, 9 Ont. R., 767, that in Interpleader, Section 6, sub-section 3 of 48 Victoria, Chapter 14—now Section 269, sub-section 3, of this Act—did not apply to the case of parties, but only to claims against the Bailiff, and was for his protection only. The cases bearing on the question were not cited to the learned Chief Justice on appeal, so his decision was reversed and the law established that the Section in question applied to the parties to the Interpleader proceeding as well as the liability of the Bailiff: 13 App. R., 296. See also *Hills v. Renny*, 5 Ex. D., 313; *Farrow v. Tobin*, 10 App. R., 69. It was the last case which drew the attention of the Legislature to the state of the law.

Proceedings in the Interpleader action are conclusive, and if any party had an adjudication therein he cannot make claim subsequently in a separate action. He should have done so in that issue: *Fox v. Symington*, App. R., 296.

It is still questionable whether an appeal lies from the determination of the Judge on a question of damage in Interpleader issues: *Idem*.

Where the Court will stay or refuse to stay proceedings in an action against the Bailiff: See *Hills v. Renny*, 5 Ex. D., 313; *Jessop v. Crawley*, 15 Q. B.,

212; *Foster v. Pritchard*, 2 H. & N., 151; *Jones v. Williams*, 4 H. & N., 706; *Tinkler v. Hilder*, 4 Ex., 187, and other cases cited at page 160 of *Sinclair's D. C. Law*, 1885.

The better opinion seems to be that an appeal will lie at the instance of a landlord who has been a party to the Interpleader proceeding: *Wilcoxon v. Searby*, 29 L. J. Ex., 154; *Sinclair's D. C. Law*, 1885, 194-196.

An appeal does not lie on a question arising between a primary creditor or plaintiff and a garnishee: *Cameron v. Allen*, 10 P. R., 192.

The officer of a Division Court is not required to retire from possession of goods that he has seized because an Interpleader summons has been issued: *Ex parte Summers*, 18 Jur., 522.

An application to remove a cause by *Certiorari* should be made in Chambers: *Bowen v. Evans*, 3 Ex., 111, R. S. O.

A *Certiorari* should be delivered to the Judge personally, but not necessarily so: *Brookman v. Wenham*, 2 L. M. & P., 233.

In Replevin, growing crops may be considered as goods and chattels under the Statute 11, Geo. 2, Chapter 19, Section 23: *Glover v. Coles*, 7 Moore, 231, 1 Bing., 6.

A bond in Replevin, though irregular as taken to the Judge, may be good as a voluntary bond: *Stansfield v. Hellawell*, 7 Ex., 373.

A Bailiff is bound to inquire into the sufficiency of the pledges or sureties in a Replevin bond: *Hindle v. Blades*, 5 Taunt., 225; *Norman v. Hope*, 14 Ont. R., 287; 2 Mew's Digest, 1453. The penalty of the bond in such case is the extreme limit of liability: *Jeffery v. Bastard*, 4 A. & E., 823; 2 Mew's Digest, 1454; 19 Q. B. D. 563.

In all actions on Replevin bonds, see 2 Mew's Digest, 1450-1457; R. & J., 3310; Ont. Digest 1884, 706; Ont. Digest 1887, 601.

A corporation may be sued in a Division Court, and may be deemed to dwell at the place where it carries on business: *Taylor v. Crowland Gas and Coke Co.*, 11 Ex., 1; *Adams v. G. W. R. Co.*, 6 H. & N., 404.

Division Courts have now the power to adjudicate upon counter-claims: See Ont. Jud. Act. Even though the amount of the claim is beyond the jurisdiction; but an amount beyond the jurisdiction of the Court cannot be the subject of judgment in that Court. See *Sinclair's D. C. Law*, 1884, 256-258, and cases there cited and 35 Albany Law Journal, 406; *Davis v. Flagstaff Silver Mining Co.*, 3 C. P. D., 228.

If a defendant gives notice of defence, it is submitted that he would thereby waive proof of service or any irregularity of service: *Davis v. Pearce*, L. R., 5 C. P., 435; *In re Jones*, 1 L. M. & P., 65.

Proof of service of summons is entirely a question for the discretion of the Judge: *Zohrab v. Smith*, 5 D. & L., 635; *Waters v. Handley*, 6 D. & L., 88. See *Robinson v. Lenaghan*, 2 Ex., 333.

Where a Statute gives a party a certain time in which to do an act, the Judge cannot limit that time of his own discretion: *Barker v. Palmer*, 8 Q. B. D., 9.

If a suitor does not properly and in time demand a jury, he cannot have one: *Fletcher v. Baker*, L. R., 9 Q. B., 370.

There cannot be a Special Jury in the Division Court: See the Jury Act and *Ex parte Armitage*. *In re Learoyd*, 17 Ch. D., 13.

The Judge of a Division Court may, it is submitted, non-suit a plaintiff in all cases in which a Judge of a Supreme Court might formerly do so: *Robinson v. Lawrence*, 7 Ex., 123.

A plaintiff has a right to be non-suited at any time before the jury has delivered a verdict, or if the cause is tried by a Judge alone, at any time before the Judge has delivered his judgment: *Outhwaite v. Hudson*, 7 Ex., 380.

It is submitted that a non-suit in the Division Court does not preclude a plaintiff from suing again, and is not a final termination of the action. In England provision is otherwise specially made: *Poyser v. Minors*, 7 Q. B. D., 329; *Davis v. Great Eastern Ry. Co.*, 39 L. T. N. S., 635.

It is doubtful if the withdrawal of a juror has any effect in a Division Court: *Norburn v. Hilliam*, L. R. 5 C. P., 129. See 18 Q. B. D., 822.

A trial cannot be adjourned without the consent of the Judge. The parties to the suit cannot do so themselves: *Morgan v. Rees*, 6 Q. B. D., 508.

A Judge has no power to go on and try a case in the absence of the plaintiff: *Jordan v. Jones*, 44 J. P., 800. It is submitted that the proper course would be to order a non-suit.

When a Judge acts as a Judge and not as the Court: See *Beadnell v. Beeson*, L. R., 3 Q. B., 439. And when he cannot decline a reference: See *Cummings v. Birkett*, 3 H. & N., 156.

A Judge cannot, except by consent or after a new trial, alter a judgment which he has formally given: *Irving v. Askew*, L. R., 5 Q. B., 208; *Jones v. Jones*, 5 D. & L., 628; *G. N. Ry. Co. v. Mossop*, 17 C. B., 130.

Where a servant sues for being improperly discharged, and fails, and afterwards sues for wages, he cannot succeed: See *Routledge v. Hislop*, 2 E. & E., 549.

To conclude a plaintiff by estoppel as to what defendant did in a previous action, it must appear that there was a judgment of the Court on the question: *Stanton v. Styles*, 1 L. M. & P., 575.

It is probable that a judgment of a Division Court would be aided against the equitable estate of the debtor: *Bennett v. Powell*, 3 Drew, 326.

A Judge, at the time, has power to order a judgment given by him to be paid by instalments: *Robinson v. Gell*, 12 C. B., 191.

A judgment of a Division Court is not removable into a Superior Court for the purpose of issuing execution thereon: *Moreton v. Holt*, 10 Ex., 707.

A warrant of commitment is good, though it states the grounds of the order for same in the alternative: *Ex parte Purdy*, 9 C. B., 201.

Where a debtor had paid a debt ordered to be paid, and afterwards arrested: See *Davies v. Fletcher*, 2 E. & B., 271.

In the case of a man's being arrested under warrant of commitment for contempt: See *Levy v. Moylan*, 10 C. B., 189.

A verbal order of the Judge sitting in Court is a "judgment" of the Court, and can be acted upon: *Ely v. Moule*, 5 Ex., 918.

The 142nd Rule of Practice does not affect the Section of this Act regulating new trials. It is merely a directory rule of practice: *Carter v. Smith*, 1 E. & B., 696.

Upon an appeal from the decision of a County Court in England, in an action for dilapidations, the case, without saying what the evidence given was, stated that the Judge told the jury that it was not like an action for goods sold and delivered, and that the plaintiff might rest upon general evidence in support of his particulars of demand, without proving every item, especially as the jury had viewed the premises with the particulars in their hands, and therefore would be able to judge whether and to what extent the plaintiff had made out his case. The Court directed a new trial: *Smith v. Douglas*, 16 C. B., 81.

Where money is garnished and garnishee has paid it into the proper Court officer's hands: see *Turnbull v. Robertson*, 38 L. T. N. S., 389.

Where a notice is required to be given a certain time before the "return day," that is the day mentioned in the summons for the sitting of the Court, it does not hold good for a *second* trial, but only for the first: *Campbell v. Fairlie*, 49 L. J. Q. B., 445. But *quære*?

A Judge has now power to award costs in certain cases beyond his jurisdiction: See Section 207 of this Act. Formerly, the general opinion was that he had not: *Sinclair's D. C. Act*, 1879, 51.

A Superior Court Judge has no power to direct a County Court Judge to order a review of taxation of costs: *Clifton v. Furley*, 7 H. & N., 783.

Although a judgment creditor has received the full amount of his debt, he is entitled to have an execution for costs, and to compel the Clerk by *Mandamus* to issue it: *R. v. Fletcher*, 2 E. & B., 279.

It would seem that an appeal would lie against the decision of a High Court Judge, or Court making absolute an order for Prohibition to a County Court Judge: *Barton v. Titchmarsh*, 42 L. T. N. S., 610.

There would be no appeal on an order for commitment: *Rackham v. Blowers*, 15 Jur., 758.

In order to determine the right of appeal in appealable cases, it is not the sum mentioned in the summons to which the Court of Appeal will look, but the sum which might have been lawfully recovered under the summons: *Mayer v. Burgess*, 4 E. & B., 655.

When the claim, as shewn by the particulars, is above the requisite sum in appealable cases, the plaintiff cannot by abandonment of the excess at the trial deprive the defendant of his right of appeal: *North v. Holroyd*, L. R. 3 Ex., 69; *Groves v. Janssens*, 9 Ex., 481.

Under the 148th Section of this Act, the money claimed, or the value of the goods claimed, or the proceeds of them, determine the right of appeal in Interpleader cases: See *Fraser v. Fothergill*, 14 C. B., 298; *Vallance v. Nash*, 2 H. & N., 712.

Under the English County Courts Act there is no appeal on a question of fact: *East Anglian Ry. Co. v. Lythgoe*, 10 C. B., 726. We do not think the right of appeal given in this Province is so limited.

The right of appeal applies to any case before the Acts allowing appeals came into force: *Rathbone v. Munn*, 18 L. T. N. S., 856.

An appeal is not precluded by a party's going into evidence: *G. N. Ry. Co. v. Rimell*, 18 C. B., 575, nor by moving for new trial: *Foster v. Green*, 6 H. & N., 793.

A Judge cannot by postdating his judgment extend the time for appealing: *Wilberforce v. Sowton*, 39 L. T. N. S., 474. See *Brown v. Shaw*, 1 Ex. D., 425; *Sinclair's D. C. Law*, 1884, 51, 220.

It is submitted that any grounds of appeal not specially taken in the Court below would not be heard on appeal: *Sinclair's D. C. Law*, 1884, 52.

At the time of hearing a motion on appeal, the Court may, if it thinks fit, dispense with a copy of the Judge's notes: *Morgan v. Davies*, 3 C. P. D., 260. Or may order *vide voce* testimony if the notes are lost: "*The Confidence*," 40 L. T. N. S., 201.

Notes compiled by a County [Division] Court Judge, after the trial, from evidence wholly on affidavits, were, being in Court, received in the Court of Appeal, although no request to take notes had been made to the Judge during the trial: *Hill v. Pessie*, 25 W. R., 275.

A judgment of a County Court Judge was upheld on other grounds than those on which the County Court proceeded if they appeared and were admitted in his notes: *Chapman v. Knight*, 5 C. P. D., 308. See also *Seymour v. Coulson*, 5 Q. B. D., 359; *Great E. Ry. Co. v. Giddons*, 44 J. P., 284.

The time within which appeal must be made runs from the time of the decision, and is not prolonged by any subsequent application to the Judge: *Hemming v. Blanton*, 21 W. R., 636; *Foster v. Green*, 7 H. & N., 881.

Should the money be paid into Court as security for the appeal, the formalities of payment would not be looked at: *Griffin v. Coleman*, 4 H. & N., 265; *Walters v. Coghlan*, L. R., 8 Q. B., 61.

As to giving the appeal bond within the proper time, see *Norris v. Carrington*, 16 C. B. N. S., 10; *Stone v. Dash*, E. B. & E., 504; *Waterton v. Baker*, L. R. 3 Q. B., 173.

In *Clark v. Roche*, 36 L. T. N. S., 78, 727, an appeal was stayed until the payment into Court of the usual deposit as security for costs. See the same case at 35 L. T. N. S., 705.

A Judge is bound to do all that is legally required of him to facilitate an appeal: *Irving v. Askew*, L. R., 5 Q. B., 208, and probably an application to compel him to do so would be appealable: *Clarke v. Roche*, 36 L. T. N. S., 727; *Crush v. Turner*, 3 Ex. D., 303.

Where a Judge dies, the new Judge may proceed to complete the appeal: *McCallum v. Cookson*, 5 C. B. N. S., 498.

A cheque on a bank, drawn in one Division where defendant does not reside and dishonored in another, cannot be sued where the cheque is drawn: *King v. Farrell*, 8 P. R., 119.

Where a letter is written in one Division, for work to be done in another, which was done there, an action cannot be brought in the latter Division for the work done: *In re Hagle v. Dalrymple*, 8 P. R., 183.

An action is maintainable in the Division Court for taxes, which the defendant agreed to pay as rent, where the plaintiff's title to the land is not disputed: *In re English v. Mulholland*, 9 P. R., 145.

Where the original demand, no matter how large, is ascertained by the signature of the party liable, and a balance not exceeding \$200 remains due, the Court has jurisdiction: *Bank of Ottawa v. McLaughlin*, 8 App. R., 523.

A plaintiff sued on a note—\$125.00—and was allowed to abandon \$25 at the trial, it was held that the plaintiff had the right to do so: *In re Stogdale and Wilson*, 8 P. R., 5. The authority of this case is very much questioned, and is at variance with the case of *In re McKenzie and Ryan*, 6 P. R., 323.

Where the interest on a note brings the whole to more than \$100, it is suable in the Division Court: *McCracken v. Creswick*, 3 P. R., 501; *In re Widmeyer v. McMahon*, 32 C. P., 187.

Two men being joint makers of a promissory note, one of them being in reality a surety for the other, the surety pays the note; *Held*, that the money paid being upwards of \$100, cannot be sued for in the Division Court: *Kinsey v. Roche*, 8 P. R., 515.

It was held that the Division Courts Act, 1880, did not apply to the Territorial Divisions and Unorganized Tracts of the Province: *In re Ontario Bank v. Harston*, 9 P. R. 47; see *In re Drinkwater v. Clarridge*, 8 P. R., 504.

Where the question of jurisdiction depends on disputed facts, and the Judge in the Division Court has inquired into them and decided the facts giving him jurisdiction, the Court will not question the correctness of his finding, but if he does not so find the want of jurisdiction clear, Prohibition

will be ordered: *Stephens v. Laplante*, 8 P. R., 52; *Re Brown v. Cocking*, L. R., 3 Q. B., 672; *Re Elston v. Rose*, L. R., 4 Q. B., 4; *Re Bushell v. Moss*, 11 P. R., 252.

The process of Division Courts is of no effect against a man residing outside the Province: *Ontario Glass Co. v. Swartz*, 9 P. R., 252, and where a defendant cannot be served owing to his residence out of the Province, neither can there be substitutional service in such a case. The principle of substitutional service is thus stated in the latest reported case on the subject by Lord Esher, Master of the Rolls: "I do not see how substituted service can be ordered where the conditions are such that original personal service could not possibly be effected. The expression 'substituted service' implies in itself that the original service could, under certain circumstances, possibly be effected." *In re Easby. Ex parte Hill v. Hymans*, 19 Q. B. D., 538; In *Robertson v. Mero*, 9 P. R., 510, Chancellor Boyd thus expresses himself on that subject: "The fact of a defendant being out of the jurisdiction is no reason for dispensing with the usual personal notice of the action, unless it appears that he is hiding or evading service, or that his whereabouts cannot be ascertained. Here his place of abode (Minnesota), is disclosed by his father, and attempts should be made to serve there before substitutional service is ordered."

The law may therefore be stated broadly, that where a defendant cannot be served by reason of the summons not running outside the Province, the difficulty cannot be got over by obtaining an order for substitutional service: See also *Wolverhampton and Staffordshire Banking Co. v. Bond*, 43 L. T. N. S., 721; *Furber v. King*, 29 W. R., 535; *Orkney v. Shanahan*, 8 L. R. Irish, 155; *Chitty's Forms*, 11th Ed., 76; *Firth v. Bush*, 9 Jur. N. S., 431; *Société Generale de Paris v. Dreyfus Brothers*, 29 Ch. D., 239. See also the Notes to Sections 100, 183 and 186 hereto. See also *Berkley v. Thompson*, 10 App. Cas., 45; *Watt v. Barnett*, 3 Q. B. D., 363.

Where claims for tort and contract were sued in the same action, the former for \$69.33 and the latter for \$42.06, and a general abandonment of \$11.39, without specifying any items upon which the abandonment was made, it was held, that Prohibition was properly ordered: *Meek v. Scobell*, 4 Ont. R., 553. See now Section 70, sub-section 3, of this Act.

If the plaintiff's claim depends on the ascertainment of the amount by evidence or the happening of events, it is not an "ascertained" sum, and if above \$100, is not suable in the Division Court: *Wiltzie v. Ward*, 8 App. R., 549. See *Forfar v. Climie*, 10 P. R., 90.

It was held in *White Sewing Machine Co. v. Belfry*, 10 P. R., 64, that the amount may be ascertained at the time of the contract, but at any time before action brought. See also *Munday v. Asprey*, 13 Ch. D., 855.

It is doubtful if an action of trover for a deed is within the jurisdiction of a Division Court: *Ginn v. Scott*, 11 U. C. R., 542.

The terms "*feri facias*" and "warrant of execution," used in the Division Courts are convertible terms: *Macfie v. Hunter*, 9 P. R., 149.

Formerly there was no right of appeal in Interpleader cases in the Division Court: *In re Turner v. Imperial Bank of Canada*, 9 P. R., 19.

It was held, in *Macfie v. Hunter*, 9 P. R., 149, that words "Execution Creditors" in Sections 11 and 12 of the Interpleader Act, included Execution Creditors in the Division Court.

A party cannot give a particular Division Court jurisdiction simply by taking garnishment proceedings where the garnishee resides, unless he can shew a debt due by the garnishee to the Primary Debtor: *In re Holland v. Wallace*, 8 P. R., 186.

Part of a larger debt can be garnished: *Re Mead v. Creary*, 32 C. P., 1.

Consent only gives jurisdiction where the suit is cognizable in *some* Division Court, not where no Division Court has jurisdiction: *Re Mend v. Creary*, 32 C. P., 1; *Christie v. McLean*, 17 L. J. N. S., 88; *Man. & Mer. M. F. Ins. Co. v. Campbell*, 1 Can. L. Times, 184; *I Knight v. Medora*, 14 App. R., 112.

Money in the hands of a Division Court Clerk as such is garnishable: *Bland v. Andrews*, 45 U. C. R., 431. See *Dolphin v. Layton*, 4 C. P. D., 130.

Where an action can be brought in *some* Division Court in the Province, the absence of a notice disputing the jurisdiction, establishes the jurisdiction of that Court to hear that cause: *Chadwick v. Ball*, 14 Q. B. D., 855; *Re Knight v. Medora*, 14 App. R., 112. The case of *Clarke v. Macdonald*, 4 Ont. R., 310, on that point, cannot now be considered law.

A witness in a Division Court suit having admitted that he was the real debtor, it was held that the Judge had power, under D. C. Rule 115, to allow him to be substituted for the defendant: *In re Henney v. Scott*, 8 P. R., 251.

The case of *Evans v. Sutton*, 8 P. R., 367, is not now law, the point having been made clear by Statute. See *Sinclair's D. C. Law*, 1884, 116 and Section 110 hereof.

As to the necessity of a plaintiff's producing note sued on before obtaining judgment: See *In re Drinkwater v. Clarridge*, 8 P. R. 504 and Section 94 hereof; *Sinclair's D. C. Act*, 1886, 21.

The Judicature Act and Rules in relation to procedure do not apply to Division Courts. No parts of the Judicature Act or Rules apply to Division Courts, except such as are specially declared to be applicable: *Bank of Ottawa v. McLaughlin*, 8 App. R., 543; *Clarke v. Macdonald*, 4 Ont. R., 310.

Prohibition does not lie to a Division Court pending an appeal in the case: *Wiltsey v. Ward*, 9 P. R., 216.

At the trial the plaintiff elected to take a non-suit and the Judge refused a new trial; it was held that the case was appealable: *Bank of Ottawa v. McLaughlin*, 8 App. R., 543.

The appointment of a Barrister to hold Division Court as Deputy Judge, clothes him with all the power of the Judge or Junior Judge so appointing within the County: *In re Leibes v. Ward*, 45 U. C. R., 375.

As to the right of the Provincial Legislature to legislate for the temporary change of a Judge so as to perform duties in a County other than his own: See *In re Wilson v. McGuire*, 2 Ont. R., 118. But, in *Gibson v. McDonald*, 7 Ont. R., 401, it was held, that a Judge of one County could not preside at the General Sessions of any County but his own: See *R. v. Fee*, 3 Ont. R., 107; *Sinclair's D. C. Law*, 1885, 138.

The doctrine of "the whole cause of action" being necessary to give jurisdiction is reiterated in *Garland v. Omnium Securities Co.*, 10 P. R., 135. See *In re Guy v. G. T. Ry. Co.*, 10 P. R., 372; *Re McCallum v. Gracey*, 10 P. R., 514; *Re Olmstead v. Errington*, 11 P. R., 366.

Where a note was for \$200, and \$7.17 interest was due upon it, it was held that the Division Court had no jurisdiction for the recovery of both sums in one action: *Re Young v. Morden*, 10 P. R., 276.

In the case of *Re McCallum v. Gracey*, 10 P. R., 514, it was held, that the death of the maker of a promissory note, the circumstances of her making a will appointing the defendant's executors were no part of the cause of action, which was complete before the granting of the probate: *Re McCallum v. Gracey*, 10 P. R., 514.

As to when a debt is "ascertained" so as to enable a plaintiff to bring an action in the increased jurisdiction of the Division Court: See *Forfar v. Clunie*, 10 P. R., 90.

The claim originally was \$156.36 and unascertained. The plaintiff admitted a set-off of \$82.05. At the trial the plaintiff affirmed and the defendant denied that there had been an agreement between them to set-off against the plaintiffs' claim the value of certain purchases made by the plaintiff from the defendant, and the Judge at the trial found, as a matter of fact, that there had been such an agreement. *Held*, following *Fleming v. Livingstone*, 6 P. R., 63; *Dixon v. Snarr*, 6 P. R., 336, that it was a question of fact for the Judge to find whether or not there had been such agreement, and having found that there was, the Court had jurisdiction: *In re Jenkins v. Miller*, 10 P. R., 95.

A Division Court has jurisdiction to entertain an action upon a judgment of a superior Court: *Re Eberts v. Brooke*, 11 P. R., 296, reversing the decision of that case as reported at 10 P. R., 257.

Where there is jurisdiction in any Division Court, a defendant has a right to apply for Prohibition at once, and the absence of notice disputing the jurisdiction is not necessary in such a case: *In re Summerfeldt v. Worts*, 13 Ont. R., 48.

As to what has been considered one entire contract: See *Re Gordon v. O'Brien*, 11 P. R., 287; *Sinclair's D. C. Act*, 1886, 16, 17.

A Division Court has jurisdiction to entertain a claim for less than \$100 made by a mortgagor upon the surplus proceeds of a mortgage sale which realized less than \$400. Such a claim is an equitable cause of action for money had and received: *Re Lagerie v. The Canadian Loan and Banking Co.*, 11 P. R., 512.

A claim aggregating more than \$100 and less than \$300 made up of two amounts, one liquidated and the other not so, and each less than \$100, cannot be sued in a Division Court: *Re Walsh v. Elliott*, 11 P. R., 520. See *Vandewater v. Horton*, 9 Ont. R., 548; *Friendly v. Needler*, 10 P. R., 267, 427; *In re The Merchants Bank v. Van Allen*, 10 P. R., 348, and Section 70.

As to the rights of Division Court attaching creditors under the Creditors' Relief Act: See *Darling v. Smith*, 10 P. R., 360.

It has been again decided that a Judge cannot upon a judgment summons make an order for the payment of the debt by the defendant within a certain time, or that in default he be committed to gaol. Prohibition was ordered: *Re Woltz v. Blakely*, 11 P. R., 430; see *Sinclair's D. C. Act*, 1879, 194; *Chichester v. Gordon*, 25 U. C. R., 527; *Dews v. Riley*, 11 C. R., 434; *Reeves v. Fowle*, W. N. 1886, 188; *R. v. Judge of Brompton C. C.*, 18 Q. B. D., 213.

In Interpleader proceedings it is doubtful if an appeal lies from a decision of a Judge in the Division Court on the question of damages: *For v. Symington*, 13 App. R., 296.

Any claims between the parties themselves must also be brought before the Judge and adjudicated upon by him; otherwise such claims are barred, and no action can be maintained for them: *Idem*.

It is doubtful, if such subsequent action should be brought, whether or not proceedings could be stayed: *Idem*.

Where a notice disputing the jurisdiction is filed, and there is nothing on the face of the proceedings to show absence of jurisdiction, it is not the place of the Judge to cross-examine witnesses to ascertain if there was really jurisdiction; that if a *prima facie* case of jurisdiction is made out, the defendant is himself to blame if it is not displaced. Prohibition was refused: *Friendly v. Needler*, 10 P. R., 427.

Personal service of a defendant out of the jurisdiction does not apply to Division Courts: *In re Guy v. G. T. Ry Co.*, 10 P. R., 352. But such service may be waived by the defendant's appearing and contesting the action at

the trial: *Idem.* See also *In re The Merchants Bank v. Van Allen*, 10 P. R., 348.

It was doubted in the case last cited if the third party clauses of the O. J. Act applied to Division Courts.

It has been again decided that a party cannot move for a new trial after the expiration of fourteen days: *Re Foley v Moran*, 11 P. R., 316.

A transcript to the County Court should not issue until after fourteen days from day of trial. *Idem.*

This does not apply to cases where disputing notice has not been given and judgment entered by default. *Idem.*

On a motion for Prohibition for the issue of a warrant of commitment on an invalid order, it is proper to make the Clerk a party to shew cause: *Re Woltz v. Blakely*, 11 P. R., 480.

Where a debt is paid after a transcript issues, but before it is sent to another Court, and where after such payment the transcript is sent without any direction by the Execution Creditor or his Solicitor as to the issue of the execution, and the plaintiff's goods are seized under execution upon the transcript and judgment. No action lies against the Execution Creditor in the Division Court, and it is questionable whether the debtor whose goods were seized could have any further relief than the restoration of his goods: *Tuckett v. Eaton*, 6 Ont. R., 486.

The law, as laid down in *Farrow v. Tobin*, 10 App. R., 69, has been changed by Section 269, sub-section 3, hereof.

A Solicitor cannot bind his client and render him liable in damages by giving to a Bailiff instructions to seize certain goods. He has no such implied authority: *Smith v. Keal*, 10 Q. B. D., 340; *Slaght v. West*, 25 U. C. R., 391, not now law; *Pardee v. Gass*, 11 Ont. R., 275.

It was held in the last case, under the circumstances there appearing, that the Bailiff was entitled to notes of action.

A defendant cannot wait and take the chances of a decision in his favor, and finding it adverse apply for a writ of *Certiorari* and properly obtain it: *In re Knight v. Medora*, 11 Ont. R., 139, 14 App. R., 112, and cases there cited.

A promissory note given for a gambling debt is not suable in the Division Court, even in the hands of an innocent holder, if Statutory notice is given: *In re Summerfeldt v. Worts*, 12 Ont. R., 48; *Harper v. Young*, 34 Alb. L. J., 376, Sup. Ct. Penn. This applies although the original party did not himself play the game: 33 Alb. L. J., 314; see *Jenks v. Turpin*, 18 Q. B. D., 505; *Bowen v. Webber*, 34 Alb. L. J., 70; Iowa Sup. Ct.

The employment of an agent to make a bet in his own name, on behalf of his principal, may imply an authority to pay the bet if lost, and on the making of the bet that authority may become irrevocable: *Read v. Anderson*, 13 Q. B. D., 779. See also *Bridger v. Savage*, 15 Q. B. D., 363; *Bank of Toronto v. McDougall*, 20 C. P., 345.

On the subject of gambling generally: See *Thorpe v. Coleman*, 1 C. B., 990; *In re Cook and Youghal Ry. Co.*, L. R. 4 Ch., 748, and notes to Section 70.

Where a County Court Judge is named to do an Act, he has no power to direct the issue of an attachment. He is only *persona designata*: *Re Pacquette*, 11 P. R., 463.

A married woman cannot be rendered liable in the Division Court on an alleged contract made by her during coverture, unless it be shown affirmatively by the person attempting to charge her that she had separate property at the time the alleged contract was made. The onus is upon him: *Palliser v. Gurney*, 19 Q. B. D., 519; *In re Shakespeare. Denkin v. Lakin*, 80 Ch. D., 169.

In England, judgments of the County Court there (somewhat analogous to our Division Court judgments) do not bear interest: *R. v. The County Court Judge of Essex*, 18 Q. B. D., 704. Interest is only recoverable there on execution from these Courts, but we think that by virtue of the 7th Section of this Act interest is recoverable on the judgment of a Division Court from the time of its becoming so: See also *Sinclair's D. C. Act*, 1879, 136.

Where an infant is sued in a Division Court for the price of goods sold to him on credit, he may, for the purpose of shewing that they were not necessities, give evidence that at the time of the sale he was sufficiently provided with goods of the kind supplied: *Johnstone v. Marks*, 19 Q. B. D., 509. It is immaterial whether the plaintiff did or did not know of the existing supply: *Barnes v. Toye*, 13 Q. B. D., 410. The case of *Ryder v. Wombwell*, L. R., 3 Ex., 90, dissented from.

It would seem to follow from these two cases that on its being proved or admitted by the pleadings that the defendant is an infant, the onus would then be upon the plaintiff to shew that the goods supplied were necessities.

Should a plaintiff or defendant not demand a jury within the prescribed time, he could not get a jury summoned afterward: *R. v. Registrar of the County Court of Leeds*, 16 Q. B. D., 691; *Fletcher v. Baker*, L. R., 9 Q. B., 370; *Sinclair's D. C. Law*, 1884, 219, 220.

A claim endorsed on a writ of "£50 and interest at the rate of £5 per cent. per annum from the date hereof until payment or judgment," was held to be a claim exceeding £50 within the meaning of the English County Courts Act, 1867, Section 7: *Insley v. Jones*, 4 Ex. D., 16.

Parties to an appeal from a Division Court may waive the limit of the statutory time for appealing: *Ward v. Raw*, L. R. 15, Eq., 83.

If one of the parties to an appeal dies, the appeal can still be prosecuted: *Hemming v. Williams*, L. R. 6 C. P., 480.

In appeal cases costs are generally allowed: *Sinclair's D. C. Law*, 1884, 221; *Conybeare v. Farries*, L. R. 5 Ex., 16; *Ashby v. Sedgwick*, L. R. 15 Eq., 245; *Booth v. Turle*, L. R. 16, Eq., 182.

A defendant should not get costs of Prohibition unless he successfully succeed in the action to be brought on the claim for which Prohibition is granted: *Re Young v. Morden*, 10 P. R., 276.

As to costs on postponement of cause, see *Sinclair's D. C. Law*, 1884, 223, 224.

An action cannot be maintained in the Division Court, or any other, on a verbal hiring for a year where the service is to commence on the second day after the hiring: *Britain v. Rossiter*, 11 Q. B. D., 123; *Cawthorne v. Cordrey*, 13 C. B., N. S., 406. See also 8 App. Cas., 467; 35 Ch. D., 681.

As to the meaning of the words "the sum in dispute," see *Sinclair's D. C. Law*, 1884, 224.

Where an action is brought to recover the price of a parcel of goods sold and delivered, and for which a bill of exchange was taken, the creditor cannot, on dishonor of the bill, recover more than Division Court costs by ignoring the existence of the bill of exchange and suing for the price of the goods: *White Sewing Machine Co. v. Del'ry*, 10 P. R., 64; *Munday v. Asprey*, 13 Ch. D., 855; *Sinclair's D. C. Act*, 1880, 9.

Proceedings cannot be taken against an absconding debtor until after the maturity of the debt: *Kyle v. Barnes*, 10 P. R., 20.

As to part failure of the consideration of a promissory note, see *Sinclair's D. C. Law*, 1884, 226, 227.

Money in the hands of the Official Manager of a Company being wound-up

and applicable for payment of a sum due to the Judgment Creditor is garnishable: *Ex parte Turner*, 30 L. J. Ch., 92.

An undoubted debt, the amount of which was unascertained was held garnishable, in *Daniel v. McCarthy*, 7 Irish C. L. R., 261. We very much doubt if this would be held good law in this Province.

A Division Court will not be outside of its jurisdiction on mere matters of practice: *Ellis v. Watt*, 8 C. B., 614; *Re McLean v. McLeod*, 5 P. R., 467; *Fee v. McIlhargey*, 9 P. R., 329; *Re Foster v. Hough*, cited at page 104 of *Sinclair's D. C. Act*, 1884.

Acquiescence may be a bar to a party's obtaining Prohibition: *Sinclair's D. C. Law*, 1884, 228.

Where a person has a return ticket for a passage from one point to another on a railway line, is illegally put off the train at an intermediate point, the cause of action for such expulsion arises at this latter place and not where the ticket is issued: *Ralph v. C. W. Ry. Co.*, 14 L. J. N. S., 172. See also *Canada Southern Ry. Co. v. Gebhard*, 109 U. S., 527.

For a discussion of the subject of Garnishment of Division Court Clerks, see 16 L. J. N. S., 336 and *Bland v. Andrews*, 45 U. C. R., 431.

A defendant does not waive his right to the full time for trial by entering a disputing notice: *Zaritz v. Mann*, 16 L. J. N. S., 141. See also *Barker v. Palmer*, 8 Q. B. D., 9; *Hudson v. Tooth*, 3 Q. B. D., 46.

Before a transcript can properly issue to the County Court, an execution in the Division Court must be issued and returned *nulla bona*: *Burgess v. Tully*, 24 C. P., 549. See also 16 L. J. N. S., 307.

It is submitted that since the cases of *Wiltzie v. Ward*, 8 App. R., 549 and *Forfar v. Climie*, 10 P. R., 90, that *Stewart v. Forsyth*, 17 L. J. N. S., 87, cannot be considered law.

The increased jurisdiction of the Division Court applies to all cases where the Notarial fees make the amount above \$100.00: *Burns v. Rogers*, 17 L. J. N. S., 209. See also *McCracken v. Creswick*, 8 P. R., 501; *In re Widmeyer v. McMahon*, 32 C. P., 187.

For some remarks on the question of Counsel fees in Division Courts, see 17 L. J. N. S., 135.

Where a Mechanics' Lien is within the jurisdiction of the Division Court, the summons should be issued and the order made in that division in which the cause of action arose or the defendant lives: *Burt v. Wallace*, 17 L. J. N. S., 70.

As to the question of the whole cause of action, see *English Loan Company v. Harris*, 17 L. J. N. S., 171.

An irregular transcript and subsequent proceedings upon it will be set aside: *McClure v. Farley*, 17 L. J. N. S., 172.

Security for costs is obtainable in the Division Court: *In re Fletcher v. Noble*, 9 P. R., 255. But, such will not be ordered where the defendant has no defence: *De St. Martin v. Davis*, W. N., 1884, p. 86; *Anglo-American v. Rowlin*, 20 L. J. N. S., 371; *Winterfield v. Bradnum*, 3 Q. B. D., 325 and notes to Section 46.

As to what is the meaning of "sufficient means and ability to pay" within the meaning of the Judgment Summons clauses, see 18 L. J. N. S., 390; *Re Ross*, 29 Grant, 385; *Dillon v. Cunningham*, L. R. 8 Ex., 23; *Chard v. Jervis*, 9 Q. B. D., 178; *Esdaile v. Viasey*, 13 Ch. D., 421; *Harper v. Scrimgeour*, 5 C. P. D., 366; *Newell v. VanPraagh*, L. R. 9 C. P., 96.

A Justice of the Peace has no power to entertain a case of master against

servant for non-fulfilment of agreement to work, and an order in such a case declaring that a servant pay a sum of money therefor, or in default to be committed to gaol at hard labor, was held, on appeal to the Division Court, to be a bad adjudication: *Brown v. Binkley*, 19 L. J. N. S., 259.

The practice of the High Court under the Judicature Act does not apply to Division Courts, except such parts as are specially so declared: *Sinclair's D. C. Law*, 1884, 96.

It is submitted that a warrant of commitment or any Division Court process that has expired cannot be renewed: *Sinclair's D. C. Law*, 1884, 97; *Lowson v. Canada F. M. Ins. Co.*, 9 P. R., 309; *Price v. Thomas*, 11 C. B., 542.

To bring a case within the increased jurisdiction the debt must be "ascertained": *Forfar v. Climie*, 10 P. R., 90; *Wiltzie v. Ward*, 8 App. R., 549.

In order to make a valid award of three arbitrators under the Division Court Act, they must be disinterested: *Re Muskoka and Gravenhurst*, 6 Ont. R., 352, and must execute the award in presence of each other, and not separately, even if they previously agreed upon the terms of the award: *Sinclair's D. C. Law*, 1884, 101; *Russell on Awards*, 4th Ed., 233; *R. & J.*, 140, 4228.

Where a Premium Note made to a Mutual Fire Insurance Company was beyond \$200 and the amount of the assessment was between \$100 and \$200, it was held that the amount was not within the increased Jurisdiction of the Court: *Manufacturers' and Merchants' M. F. Ins. Co. v. Campbell*, 1 Can. L. T., 134; *Munday v. Asprey*, 13 Ch. D., 855.

A Judge in the Division Court is only required to take down the evidence, in writing, under the increased jurisdiction clause of the Division Court Act: *Bank of Montreal v. Statten*, 1 Can. L. T., 66.

A case can only be transferred before Judgment from one Division Court to another when it has been entered in the wrong Court by mistake or inadvertence: *Hands v. Noble*, 3 Can. L. T., 215.

As to when the plaintiff and defendant can make such application, see *Hands v. Noble*, 3 Can. L. T., 215.

The failure to comply with the rules of practice of the Division Court has not the effect of ousting the jurisdiction of the Division Court: *Re Foster v. Hough*, (not yet reported), following *Fee v. Mellhargey*, 9 P. R., 329.

An action is maintainable in the Division Court on a Judgment of the County Court: 20 L. J. N. S., 175: reversed in appeal, 11 P. R., 296.

The Judgment in an Interpleader issue is final between the parties: *Hunter v. Vanstone*, 7 App. R., 750. See also *Mason v. Wirral Highway Board*, 4 Q. B. D., 459.

When a cheque operates as payment of a Division Court Judgment, see *McLeish v. Howard*, 3 App. R., 503.

It is for a Jury to say whether or not a Bailiff's negligence was the cause of the plaintiff's damage: *Nerlich v. Malloy*, 4 App. R., 430.

As to the powers of a Judge where counties are grouped, see *In re Wilson v. McGuire*, 2 Ont. R., 118; *R. v. Bennett*, 1 Ont. R., 445; *R. v. Richardson*, 8 Ont. R., 651; *Richardson v. Ransom*, 10 Ont. R., 387.

Personal service of notice of action is not necessary, but service on the wife at the defendant's residence is sufficient: *Hanna v. Johnston*, 3 Ont. R., 100.

The Court in which the action is to be brought need not be stated in the notice, but even if required, the statement in the notice that the action would be brought in the High Court of Justice, without naming the particular Division, would be sufficient. *Idem*.

In computing the time in which the action must be brought, the day on which the fact was committed must be excluded. For instance, an action commenced on the 5th June for an act committed on the 5th December would be in time. *Idem*. See also *Allen v. McQuarrie*, 44 U. C. R., 62; *Neill v. McMillan*, 25 U. C. R., 485; *Maxwell on Statutes*, 1st Ed., 174.

Where a special arrangement was made between the plaintiff and Clerk, under which he was to receive no costs, but disbursements only, in all suits entered with him by the plaintiffs, in which nothing was realized, and he, on his part, guaranteed the Court had jurisdiction; it was held that the special agreement made with the Clerk discharged his sureties: *Victoria M. F. Ins. Co. v. Davidson*, 3 Ont. R., 378, and the cases cited on page 110 of *Sinclair's D. C. Law*, 1884.

The requirements of Division Court Rule 142, as to new trials are directory, not imperative: *Fee v. McIlhargey*, 9 P. R., 329.

As to an order for taxation of costs, conflicting with an action in the Division Court for the amount thereof, see *Re Burdett*, a Solicitor, 9 P. R., 487.

As to the rate of interest to be charged on debts after maturity and up to the time of Judgment, see *Sinclair's D. C. Law*, 1884, 117-119; *Powell v. Peek*, 12 Ont. R., 492, sustained in appeal, but not yet reported; *Hamer v. Rigby*, Sup. Ct. Miss., 21st Nov., 1887.

The Chattel Mortgage Act does not apply to cases of joint ownership of chattel property so as to render it necessary to observe its provisions in respect to a mortgage or conveyance of an undivided interest in any chattel: *Gunn v. Burgess*, 5 Ont. R., 685.

The Directors of an Insurance Company assessed the defendant, a policy-holder, for several sums, one of which was illegal. They sent one notice to him claiming the amount of all the assessments, including the illegal one, in one sum. It was held that the Company was not entitled to recover any of the assessments: *Victoria Mut. Ins. Co. v. Thompson*, 20 L. J. N. S., 146.

As to an appeal to the Division Court against an award under the Drainage Act, see *In re Bell and Codling*, 18 L. J. N. S., 15.

Held, also, that the Judge had no power to amend the award. *Idem*.

Prohibition.—Where an inferior Court proceeds in a case properly within its jurisdiction, Prohibition cannot be awarded until some question is raised which the Court is not competent to try: *Mayor of London v. Cox*, L. R., 2 H. L., 239. But where the foundation for the jurisdiction is itself defective, Prohibition may be applied for at once. In addition to the cases cited on pages 12-48 of *Sinclair's D. C. Act*, 1879, on this subject, the reader is referred to the foregoing notes to this Section on the subject of jurisdiction.

In the State of New York the writ of Prohibition is not one demandable of right, but of sound judicial discretion. Under our law there is somewhat of a conflict in the cases upon that subject. In the State to which we have referred, a history of the writ in England will be found in the judgment of the Court of Appeals in the case of *People v. Westbrook*, 89 N. Y., 167.

When the Superior Court is clearly of the opinion, both in regard to the facts and the law, that an inferior Court is exceeding its jurisdiction, it is bound to grant the writ, whether the applicant be the defendant below or a stranger: *Worthington v. Jeffries*, L. R., 10 C. P., 379; *Taylor v. Nicholls*, 1 C. P. D., 242. In *Chambers v. Green*, L. R., 20 Eq., 552, the Master of the Rolls refused to follow *Worthington v. Jeffries*, and held that, where a stranger applied, the granting of the writ was discretionary: *R. v. Twiss*, L. R., 4 Q. B., 407. In *Ellis v. Fleming*, 1 C. P. D., 237, however, the Common Pleas Division adhered to their former decision.

In such a case, neither the smallness of the claim nor delay on the part of the applicant is ground for refusing the writ: *Ellis v. Fleming*, 1 C. P. D., 237.

In a doubtful case the Court will not interfere. The practice respecting the issue of writs of Prohibition, Mandamus and Injunction in this Province is regulated by Chapter 52 of the R. S. O.

A form of affidavit for the writ of Prohibition will be found at page 47, Sinclair's D. C. Act. 1879; Chitty's Forms, 11th Ed., 750.

A writ of Prohibition will not issue simply because the affidavit on which a garnishment order was issued proved defective, that being held a mere matter of practice which the Court would, on application for Prohibition, not take notice of: *In re Sato v. Hubbard*, 8 P. R., 445.

Where a Statute prescribes that a thing shall be done within a certain time, or where a party has a certain time to perform an act, the time so prescribed is obligatory and not merely directory under the Statute, and, if violated, Prohibition will lie: *Barker v. Palmer*, 8 Q. B. D., 9. The writ will not only lie to an inferior Court, but to an officer of a Municipal Corporation: *Cote v. Morgan*, 7 Sup. R., 1; *R. v. Local Government Board*, 10 Q. B. D., 309.

The Court has jurisdiction by analogy to a writ of Prohibition to restrain by Injunction an arbitrator from proceeding with a reference on the ground of corruption: *Malsbury Ry. Co. v. Budd*, 2 Ch. D., 113.

For a Judge of the County Court to act in the Division Court in any other County but his own is *ultra vires* on his part, and Prohibition will not lie against him for it: *In re Wilson v. McGuire*, 2 Ont. R., 118.

Prohibition will not issue to a Surrogate Court Judge to prohibit him from issuing Letters of Administration to a certain person: *Re O'Brien*, 3 Ont. R., 326.

The writ will not lie because the Judge investigates matters on a counter-claim otherwise beyond the jurisdiction of the Court, but he cannot adjudicate upon matters beyond the pecuniary jurisdiction in cases of counter-claim, but should investigate the claim thereon, giving judgment, if necessary, up to the amount of the jurisdiction: *Neald v. Corkindale*, 4 Ont. R., 317; *Davis v. The Flagstaff S. M. Co. of Utah*, 3 C. P. D., 228. A plaintiff cannot discontinue his action where there is a counter-claim: *Beddall v. Maitland*, 17 Chy. D., 174.

Prohibition will not lie where a party has taken advantage of his right to appeal: *In re Brown v. Wallace*, 8 L. J. N. S., 81.

The doctrine of "the cause of action" amounts to the whole cause of action reiterated in *Garland v. Omnium Securities' Co.* 10 P. R., 135.

As to a cause of action arising in such a place as would give jurisdiction, see *Alderton v. Archer*, W. N. 1881, 206.

Prohibition will lie against a Judge whose jurisdiction is *persona designata*, as well as where he may be exercising the functions of a Judge of the Court: *Re Pacquette*, 11 P. R., 463.

We do not think a Court can acquire jurisdiction simply by making a "pocket" defendant. He must be actually and *bona fide* a defendant, and must not be made so for the purpose of suing in a particular Division in the Division Court: *Baker v. Wait*, L. R. 9 Eq., 103. The case of *Bridges v. Douglas*, 13 L. J. N. S., 358, cannot now be considered good law to the extent it would seem to go.

If a defendant in the Division Court has not been served with a summons in the ordinary way, the plaintiff can be prohibited, unless by appearing to the summons and taking part in the suit at the trial he waives it: *In re The*

Merchants Bank v. VanAllen, 10 P. R., 348; *In re Guy v. G. T. Ry. Co.*, 10 P. R., 372; *Popfinger v. Yutte*, 33 Alb. L. J., 393.

It is doubtful whether the third party clauses of the O. J. Act apply to Division Courts: *In re Guy v. G. T. Ry. Co.*, 10 P. R., 372.

When an action is "ascertained" by the acts of the parties within County Court jurisdiction, see *Wallbridge v. Brown*, 18 U. C. R., 158; *McNaughton v. Webster*, 6 U. C. L. J., 17; *Durnin v. McLean*, 10 P. R., 295; *Watson v. Severn*, 6 P. R., 559; *Greenizen v. Burns*, 13 App. R., 481; *Furnival v. Saunders*, 26 U. C. R., 119.

If a County Court has no jurisdiction, Prohibition will lie to prohibit its proceedings as well as in the Division Court: *In re Judge of Northumberland and Durham*, 19 C. P., 299.

Prohibition will lie in any case where the defendant resides out of the Province: *Ontario Glass Co. v. Swartz*, 9 P. R., 252; *Gallagher v. Gairdner*, 2 Ch. Cham. 480; *Dulmage v. The Judge of Leeds and Grenville*, 12 U. C. R., 32; *Smith v. Babcock*, 9 P. R., 97; *Bank of B. N. A. v. Eddy*, 9 P. R., 396.

Prohibition will lie where the action is brought in a Division where the whole cause of the action did not arise, if the defendant does not reside there: See *McWhirter v. Bondgard*, 14 U. C. R., 84; *Kemp v. Owen*, 14 C. P., 432; *Carsley v. Fiskin*, 4 P. R., 255; *Watt v. VanEvery*, 23 U. C. R., 196; *Noxon v. Holmes*, 24 C. P., 541.

Provision is now made in which service of proceedings can be made on Railway Companies whose head office is out of the Province: See Sections 84, 101, 182, 186. It applies to other corporations as well.

Prima facie proof of title to land being wanting, and that such title must come in question to oust jurisdiction, and no cause being shown to the contrary, Prohibition is granted: *Macara v. Morrish*, 11 C. P., 74.

Where a dispute arose concerning the release of a conveyance, it was held that the title to land did not come in question: *Re Bradshaw v. Duffy*, 4 P. R., 50.

In an Interpleader application the Judge may try the property in the case, even though the inquiry may involve the title to land: *Munsie v. McKinley*, 15 C. P., 50.

The plaintiff sued a married woman on a judgment exceeding \$200, but abandoned the excess above that sum. The defendant claimed a set-off exceeding \$400, consisting of various connected items. Held, that Prohibition would not lie, and that the suit was clearly within the jurisdiction: *Read v. Wedge*, 20 U. C. R., 456.

As to the abandonment of an amount beyond the jurisdiction of the Court, see *In re Higginbotham v. Moore*, 21 U. C. R., 326.

The plaintiff in a Division Court matter may recover \$100, being the balance of an unsettled account not exceeding \$400. When the whole account exceeds that sum there is no jurisdiction. An unsettled account means an account the amount of which has not been adjusted, determined or admitted by some act of the parties: *In re Hall v. Curtain*, 28 U. C. R., 533.

As to what is an unsettled account, see *In re the Judge of the County Court of the United Counties of Northumberland and Durham*, 19 C. P., 299; *McRae v. Robins*, 20 C. P., 135.

Prohibition will be granted when a party splits the cause of action to bring it within the jurisdiction of the Division Court: *In re Grace v. Walsh*, 3 P. R., 196; *Gilbert v. Gilbert*, 4 L. J. N. S., 229; *Light v. Lyons*, 7 U. C. L. J., 74; *McRae v. Robins*, 20 C. P., 135.

The commencement of a suit in the Division Court for part only of an entire claim and endorsing an abandonment of the balance on the summons is not *per se* a release of the cause, but the part so abandoned cannot be sued for after recovery of judgment in such suit: *Winger v. Sibbald*, 2 App. R., 610; *Adkin v. Friend*, 38 L. T. N. S., 393.

Infants are not prohibited from suing in the Division Court upon a contract for wages or anything else: *Ferris v. Fox*, 11 U. C. R., 612.

Division Courts have jurisdiction in actions of detinue. It was so held in *Lucas v. Elliott*, 9 U. C. L. J., 147. See also page 40 *ante*, R. & J., 1075.

Prohibition will not go to restrain a motion for new trial in a garnishment proceeding, even after the lapse of 14 days from the trial: *McLean v. McLeod*, 5 P. R., 467.

An action for breach of warranty of a horse, where the damages recovered were not \$100, was held within the jurisdiction of a Division Court: *Morris v. Cameron*, 12 C. P., 422.

A party who does not raise the question of jurisdiction at the first trial is not prohibited from raising the question on the second trial, a new trial having been granted: *Deadman v. Agriculture & Arts Ass'n*, 6 P. R., 176.

The Court above will not enquire into the regularity of proceedings in a Division Court Interpleader proceeding: *Finlayson v. Howard*, 1 P. R., 224. Nor will they remove it by *Certiorari*: *Russell v. Williams*, 8 U. C. L. J., 277.

The decision of a Judge of a Division Court on an Interpleader issue formerly was final: *Kean v. Stedman*, 10 C. P., 435. But now see Section 148.

An informal judgment is not the subject of Prohibition: *Oliphant v. Leslie*, 24 U. C. R., 398; *Harmer v. Cowan*, 23 U. C. R., 479.

On an Interpleader issue the Judge may determine the claimant's right to an equitable interest in the property: *McIntosh v. McIntosh*, 18 Grant, 58.

Where a writ of *Certiorari* is not delivered until after the Jury has rendered a verdict, held too late: *Black v. Weeley*, 8 U. C. L. J., 277.

Judgment of a Division Court was set off and allowed against a judgment of the High Court: *Robinson v. Shields*, 2 L. J. N. S., 45.

A new Judge may order a new trial in a case tried before his predecessor: *Appelbe v. Baker*, 27 U. C. R., 486.

A Division Court Judge may adjourn the hearing of a case to his chambers: *In re Burrowes*, 18 C. P., 493.

A Division Court has power in garnishment proceedings when the justice of the case requires it to grant a new trial after the lapse of 14 days: *McLean v. Howard*, 5 P. R., 467.

Notwithstanding payment into Court there may be a nonsuit: *Oakes v. Morgan*, 8 L. J. N. S., 248.

Notice of action given under the Division Courts Act must state the time and place of the alleged trespass: *Moore v. Gidley*, 32 U. C. R., 233.

Statutes relating to the practice and procedure of the Division Court apply only to matters within its jurisdiction and cannot be called in aid to give jurisdiction where it is in question: *Ahrens v. McGilligat*, 23 C. P., 171.

Prohibition is granted to restrain an excessive jurisdiction, but not to correct any irregularity or even injustice which may have been done: *MacKonoehie v. Penzance*, 6 App. Cas., 443.

Part of a case may be prohibited: *Dutens v. Robson*, 1 H. B., 100; *Carslake v. Mapledoram*, 2 T. R., 473.

Prohibition was granted where a second order of commitment was issued, pending the first: *Horsnail v. Bruce*, L. R., 8 C. P., 378.

It is said by BAERT, Lord Justice, in *R. v. Local Government Board*, 10 Q. B. D., 309, that Prohibition should, in certain cases, be freely granted.

Where there is no jurisdiction it is not necessary to entitle a party to the writ that the objection to the want of jurisdiction should have been made in the inferior Court and overruled: *De Haber v. Portugal*, (Queen) 17 Q. B., 171. It will not be granted where it is not material: *Butterworth v. Walker*, 3 Burr, 1689.

As to what constitutes a judicial proceeding, see *Death*, *Ex parte* 18 Q. B., 647.

Prohibition will be granted to an inferior Court after judgment where the irregularity appears upon the face of the proceedings: *Roberts v. Humby*, 3 M. & W., 120.

In *Harrington (Earl) v. Ramsay*, 8 Ex., 879, a motion was made for Prohibition after an appeal. The writ will not issue after judgment, unless it is perfectly clear that there has been an excess of jurisdiction: *Ricardo v. Maiden Head Local Board*, 2 H. & N., 257.

Prohibition will not be granted merely because of a defect in the judgment: *Enraght v. Penzance*, 7 App. Cas., 240. Prohibition was denied where the matter of suggestion was a proceeding and not verified by affidavit: *Caton v. Burton*, Cowper, 330.

A writ of Prohibition can be issued to the highest of Courts: *Darby v. Cosens*, 1 T. R., 552; *Smyth*, *Ex parte* 2 C. M. & H., 748. Writ lies to a criminal Court as well as to a civil: *R. v. Herford*, 3 E. & E., 115.

The writ may even issue at the instance of a stranger: *Quartly v. Timmins*, L. R. 9 C. P., 416; *Willis v. Harris*, 43 L. J. C. P., 208; *Robinson v. Emanuel*, L. R. 9 C. P., 414.

Where a writ of Prohibition is applied for by either of the parties to a suit, or by a stranger to such suit, the only discretion which the Court has to refuse such writ is being in doubt, as to fact or law, whether the inferior Court is exceeding its jurisdiction, or is acting without jurisdiction: *Worthington v. Jeffries*, L. R. 10 C. P., 379. But see *Chambers v. Green*, L. R. 20, Eq., 552.

Prohibition may be moved for by a defendant himself where the Court is satisfied that an inferior Court is proceeding without jurisdiction: *Bridge v. Branch*, 1 C. P. D., 633.

Where a Statute has pointed out a particular means of restraining a course of action the Court will refuse Prohibition: *Stannard v. St. Giles*, *Cerise*, 20 Ch. D., 190.

Every Judge of the High Court has, since the O. J. Act, power to grant Prohibition: *Hedley v. Bares*, 13 Ch. D., 498.

Prohibition will be granted in a case where a party has a certain time to perform an act and that time has not been allowed him: *Barker v. Palmer*, 8 Q. B. D., 9.

Prohibition may be waived by the defendant in the suit: *Yates v. Palmer*, 6 D. & L., 283.

Material delay will be a bar to the writ: *In re Denton*, 1 H. & C., 654.

It is no objection to an affidavit for an order *nisi* and Prohibition that it is stated to be, "In the matter of an action commenced," in the inferior Court: *Wallace v. Allen*, 32 L. T. N. S., 830.

Affidavits in support of an application for Prohibition should be entitled simply in the Court and not in any cause: *Ex parte Evans*, 2 Dowl. N. S., 410.

In re Miron v. McCabe, 4 P. R., 171; *Siddall v. Gibson*, 17 U. C. R., 98; *In re Burrowes*, 18 C. P., 493.

When an application for Prohibition has been discharged, the Court will not allow the motion to be renewed upon affidavits stating matter not before presented to the Court, but existing at the time of the original application: *Bodenham v. Ricketts*, 6 N. & M., 537.

The Court will generally compel the party applying for Prohibition to declare whether the demand is made by the defendant or not: *Remington v. Dolway*, 9 Q. B., 176.

The Court will not award restitution in Prohibition when the subject matter of a suit is no longer within the control of the inferior Court: *In re Denton*, 1 H. & C., 654.

As to the costs in Prohibition, see 6 Mew's Digest, 270; R. S. O., Chapter 52, Section 2; *Wallace v. Allen*, L. R., 10 C. P., 607.

Where the Judge has decided against law and good conscience, it is no ground for a new trial if the Judge had jurisdiction in the case: *Siddall v. Gibson*, 17 U. C. R., 98.

Prohibition appears to be the remedy where an action is brought against school trustees in the Division Court: Chief Superintendent of Schools; *Milne v. Sylvester*, 18 U. C. R., 538.

A certificate of the Judge in the Court below as to the facts of a case was held to govern: *In re Clarke*, 2 L. J. N. S., 266.

Prohibition was refused where all the material on which the order was issued was not proved before the Judge: *In re Grass v. Allan*, 26 U. C. R., 123.

Prohibition was refused to prohibit the action of arbitrators appointed to settle the disputes between Ontario and Quebec: *Re Ontario and Quebec*, 6 L. J. N. S., 212.

Where witnesses were cross-examined and the case argued before a Judge, and no exception to the jurisdiction taken, it was held that the defendant was precluded from objecting after judgment and execution: *In re Burrowes*, 18 C. P., 493.

Prohibition will not go for mere irregularities in practice: *McLean v. McLeod*, 5 P. R., 467.

A Prohibition may go in the first instance without the question of jurisdiction being raised at any proceedings in the Court below, but when a party applies who has not raised the question there, he will not be allowed his costs: *Nerlich v. Clifford*, 6 P. R., 212.

Where a Judge makes an order, which, though possibly erroneous in itself, is made at the request of one of the parties and is acted upon, a Prohibition at the request of such party will be refused: *Richardson v. Shaw*, 6 P. R., 296.

The Judge of a County Court has the right at the trial of a cause, where the jurisdiction of the Court is denied, to enquire into the facts to ascertain whether or not he has jurisdiction. Until such enquiry has been made, Prohibition will be refused: *In re Dixon v. Snarr*, 6 P. R., 336.

Prohibition will be granted to the Court of General Sessions: R. & J., 3066.

There is no authority in this Province for a Judge to stay proceedings in the Court below pending Prohibition: *Miron v. McCabe*, 4 P. R., 171.

Prohibition was granted to a Division Court upon an action on a cheque made within the Division of that Court, payable by and dishonored by a bank in another Division: *King v. Farrell*, 8 P. R., 119.

Services ordered by letter in one Division to be done in another cannot be sued in the latter Division: *In re Hagel v. Dalrymple*, 8 P. R., 183.

See *Re English v. Mulholland*, 9 P. R., 145, where the title to land did not come in question.

Prohibition will not lie where the original demand, no matter how much, is ascertained by the signature of the party liable and a balance not exceeding \$200 remains due: *Bank of Ottawa v. McLaughlin*, 8 App. R., 543.

It was held, in the case of *In re Stogdale and Wilson*, 8 P. R., 5, that a plaintiff at the trial might abandon in his particulars the excess of \$100 so as to bring the case within the Division Court jurisdiction, but the authority of that case is questioned.

Where the principal and interest upon a promissory note amounts to upwards of \$100 it is still within the jurisdiction of the Division Court: *McCracken v. Creswick*, 8 P. R., 501; *In re Widmeyer v. McMahon*, 32 C. P., 187.

Money paid as surety for another is not recoverable in the Division Court to an amount beyond \$700: *Kinsey v. Roach*, 8 P. R., 515.

It was held, in *In re The Ontario Bank v. Harston*, 9 P. R., 47, that the Division Courts Act of 1880 did not apply to Division Courts in the Territorial Divisions and Unorganized Tracts.

Where the Judge has to find on facts before determining jurisdiction, Prohibition will not go unless he has not so found: *Stephens v. Laplante*, 8 P. R., 52.

Abandonment to be of any effect must not be general, but of a particular part of the particulars: *Meek v. Scobell*, 4 Ont. R., 553.

Prohibition will be granted unless the amount sued for in the extended jurisdiction is "ascertained" by the signature of the defendant: *Wiltie v. Ward*, 8 App. R., 549; *Forfar v. Christie*, 10 P. R., 90.

In an action against a married woman the absence of proof of separate estate at the time of the contract (*In re Shakespear, Deakin v. Lakin*, 30 Ch. D., 169, *Falliser v. Gurney*, 19 Q. B. D., 519) though it may be urged as a defence does not affect the jurisdiction, and Prohibition will be refused.

A plaintiff in a Division Court proceeding against a primary debtor and a garnishee in a Court which would not have jurisdiction against the primary debtor alone, must prove a garnishable debt in the hands of the garnishee, otherwise Prohibition will lie: *In re Holland v. Wallace*, 8 P. R., 186.

A garnishee is not a defendant within the meaning of the Division Court law.

It was held in *Bland v. Andrews*, 45 U. C. R., 431, that money in the hands of a Division Court Clerk for a suitor in a cause was garnishable, but until demand made no garnishment proceedings could be taken.

A notice disputing the jurisdiction is not necessary if the claim sued for is not within the jurisdiction of any Division Court within the Province: *Clarke v. Macdonald*, 4 Q. B. D., 310.

Prohibition will not lie where the name of a witness was substituted for the defendant: *In Re Henney*, 8 P. R., 251.

Application for new trial is not a waiver of the defendant's right to object to the jurisdiction: *In re Evans v. Sutton*, 8 P. R., 367.

After judgment in a Division Court the defendant within 14 days moved, on notice filed with the Clerk of the Court, for a new trial on the ground of discovery of fresh evidence, but did not within the 14 days file an affidavit as required by Division Court Rule 142. Such affidavit was subsequently filed, the motion heard and a new trial granted by the Judge. Held, on motion for Prohibition, that the Court had jurisdiction, the transgression of the rule of practice forming no ground for Prohibition: *Fee v. McIlhargey*, 9 P. R., 329.

Prohibition to a Division Court does not exist, pending an appeal from that Court to the Court of Appeal: *Wiltie v. Ward*, 9 P. R., 216.

At the trial the plaintiff elected to take a nonsuit, and the Judge refused a new trial. Held, that the plaintiff was entitled to move to set aside the nonsuit, and if refused could appeal therefrom: *Bank of Ottawa v. McLaughlin*, 8 App. R., 543. We submit that an appeal would lie only where the nonsuit was taken in deference to the opinion of the Judge: *R. & J.*, 2599.

A Deputy Judge has, within the County for which he is appointed such deputy, all the powers of the Judge during the time of his appointment: *In re Leibes v. Ward*, 45 U. C. R., 375.

Action must be brought where the whole cause of action arose: *Garland v. The Omnium Securities Company*, 10 P. R., 135. See *In re Guy v. G. T. Ry. Co.*, 10 P. R., 372. *Re McCallum v. Gracey*, 10 P. R., 514. *Re Oimstead v. Errington*, 11 P. R., 366.

Prohibition was granted where a claim was made for \$200 on a promissory note for that amount, and \$7.17 accrued interest and costs, as being beyond the jurisdiction of a Division Court: *Re Young v. Morden*, 10 P. R., 276.

It was held in the case of *Re McCallum v. Gracey*, 10 P. R., 514, that the death of the maker of a note, the circumstance of her making a will appointing the defendants executors, and the proving of the will by the executors was no part of the cause of action which was complete before the granting of the probate.

Where certain facts have to be found to entitle a Division Court to jurisdiction, and the Judge found these facts in favor of the plaintiff, Prohibition was refused: *In Re Jenkins v. Miller*, 10 P. R., 95.

A Division Court has jurisdiction to entertain an action brought upon the judgment of a Superior Court: *Re Eberts v. Brooke*, 10 P. R., 257, 11 P. R., 296.

Prohibition will go at once when an action in which a Division Court has no jurisdiction is brought and the fact of no notice of Statutory defence being given does not affect the defendant's right to the writ: *In re Summerfeldt v. Worts*, 12 Ont. R., 48; *Harper v. Young*, 34 Alb. L. J., 376. In *Bushel v. Moss*, 11 P. R., 251, the question in dispute was whether a single article formed part of the freehold or was a chattel. The Judge of the Division Court found that it was a chattel. It was held that his decision should not be interfered with by way of Prohibition.

What is splitting a cause of action? See *Re Gordon v. O'Brien*, 11 P. R., 287; *Sinclair's D. C. Act*, 1886, 16, 17.

Surplus money to a less sum than \$100 of a mortgage sale, which realized less than \$100, is such an equitable cause of action as is suable in the Division Court and Prohibition was refused: *Re Legarie v. Canada Loan & Banking Co.*, 11 P. R., 512.

A claim for less than \$100 on an "ascertained" debt, and for a somewhat similar sum on a liquidated debt, in the aggregate amounting to upwards of \$100, is not suable in the Division Court: *Re Walsh v. Elliott*, 11 P. R., 520. See *Vandewaters v. Horton*, 9 Ont. R., 548; *Friendly v. Needler*, 10 P. R., 267; *In re The Merchants Bank v. Van Allen*, 10 P. R., 348.

As to the distribution of moneys in the hands of a Sheriff under the Absconding Debtors' Act among Division Court attaching creditors, see *Darling v. Smith*, 10 P. R., 360.

Prohibition will be ordered to restrain the proceedings upon a warrant of commitment where it is made in the alternative form, either of paying the judgment debt within a fixed period, or in default, that the defendant should be committed to gaol: *Re Woltz v. Blakely*, 11 P. R., 430.

An adjudication in the Division Court is final and conclusive as well to the

right of property in dispute as to damages sustained by the seizure: *Fox v. Symington*, 13 App. R., 296.

It is no part of a Judge's duty to cross-examine a witness to ascertain if there is jurisdiction in a case. If nothing appears upon the papers to the contrary and *prima facie* there appears to be jurisdiction, it is for the defendant to displace that: *Friendly v. Needler*, 10 P. R., 267.

Where certain corporations having their head offices beyond the jurisdiction of the Court, do business in Ontario, their agent may be served with process under the provisions of Section 101.

The Judge of a Division Court has no jurisdiction to set aside a judgment after the expiration of 14 days from the trial: *Re Foley v. Moran*, 11 P. R., 316.

The practice under Rule 270 of the O. J. Act is not applicable to Division Courts: *Idem*. See also, *Woltz v. Blakely*, 11 P. R., 430; *In re Knight v. Medora*, 11 Ont. R., 138 and 14 App. R., 112.

As to giving notice of action to a Bailiff, see *Pardee v. Glass*, 11 Ont. R., 275 and the notes to Section 70.

Motion for Prohibition to a Division Court on the ground that the Western Fair Association did not exist in fact or in law, and could have no title to the Grand Stand in dispute, and therefore, the Court had no jurisdiction to endorse the judgment in this suit: *Held*, that the question of corporation or no corporation was one of fact and that the decision thereon was not reviewable under Prohibition: *Re The Western Fair Association v. Hutchinson*, 12 P. R., 40.

It was held that the question whether a medical health officer of a city was an employee having \$25 exempt from garnishment, was reviewable on a motion for Prohibition: *Macfie v. Hutchinson*, 12 P. R., 167. It was also held that such salary was not exempt. *Idem*.

Where a discretion is given by will to pay the primary debtor anything or not, moneys in their hands is not garnishable: *R. v. The Judge of Lincolnshire W. N.*, 1887, 235.

For a more particular reference on the subject of Prohibition, the reader is referred to the cases appearing in the following works and at the following pages: 2 Mew's Digest, 1410-1450; 6 Mew's Digest, 269-270; Chitty's Forms, 11th Ed., 750; R. S. O., Chapter 52; R. & J., 1098, 3064; Taylor on Evidence, 8th Ed., 166, 167; Ontario Digest, 1884, 214, 659; Ontario Digest, 1887, 198, 203, 668; Sinclair's D. C. Act, 1879, 42, 48; Sinclair's D. C. Law, 1884, 273 and pages cited; Sinclair's D. C. Law, 1885, 307, 308, and pages there cited; Sinclair's D. C. Act, 1886, 15.

Mandamus.—As remarked at page 48 of Sinclair's D. C. Act, 1879, this is a prerogative writ, and Division Courts, through their officers, are subject to the exercise of its jurisdiction. But it is not a writ grantable of right. In *Rhodes v. Liverpool Commercial Investment Co.*, 4 C. P. D., 425, LOPEZ, J., says at page 131: "The granting a Mandamus, or a rule or order in the nature of a Mandamus, is always matter of discretion": *R. v. All Saints (Wigan) Churchwardens*, 1 App. Cas., 611. A Mandamus will not go unless it is clear that there has been a direct refusal to do that which it is the object of the Mandamus to enforce, either in terms or by circumstances which distinctly show an intention in the party to withhold from doing the act required: *R. v. Brecknock, &c., Canal Co.*, 3 A. & E., 217. The writ will not be ordered unless there has been a distinct demand and refusal to perform the act required: *R. v. Bristol Co.*, 4 Q. B., 162. The demand may be made for the performance of one of three things: *R. v. St. Margaret's, Leicester*, 8 A. & E., 889.

The process of the Court ought not to be made auxiliary to a transaction which violates the law. The writ goes to inferior tribunals to oblige them to do justice as the law enjoins. It is a writ emphatically *in subsidium justitiæ*, and does not lie to give effect to illegality. The Court will not assist an illegal transaction. It punishes the parties to the illegality by refusing its aid: *R. v. Littledale*, 10 L. R. Irish, 78.

When a new right is created by Act of Parliament the proper mode of enforcing it is by Mandamus: *Simpson v. Scottish Union F. & L. Ins. Co.*, 9 Jur. N. S., 711.

Where an Act of Parliament directs that under certain circumstances one or other of two things shall be done, the party to do the act has the option of doing which act he pleases, and a Mandamus not giving such option or stating a sufficient reason why such option no longer exists as laid in law: *R. v. South E. Ry. Co.*, 4 H. L. Cas., 471.

The Court is not justified in extending the remedy by Mandamus to cases which it does not by law extend, though the parties waive the objection: *R. v. Treasury (Lords)*, 16 Q. B., 357.

Where the writ would be inoperative and not beneficial it will not be granted: *R. v. Bridgeman*, 10 Jur., 159.

The act ordered must be possible to be done: *R. v. L. & N. W. Ry. Co.*, 6 Railway Cas., 634.

Where a Company could not do the act through want of funds, it was refused: *Re Bristol and N. Somerset Ry. Co.*, 3 Q. B. D., 284.

The application for Mandamus must be *bona fide*: *R. v. Liverpool & C. Ry. Co.*, 16 Jur., 949.

The writ is erroneous when it orders more than the Statute requires: *York and North Midland Ry. Co. v. Milner*, 15 L. J. Q. B., 378.

For neglect of a public duty, Mandamus and not injunction is the proper remedy: *Glossop v. Heston Local Board*, 12 Ch. D., 302.

Where an inferior Court has a special jurisdiction given it by some local Act, and refuses to exercise that jurisdiction: See *In re Brighton Sewers Act*, 9 Q. B. D., 723.

Should a Judge of a Division Court, upon an Interpleader summons erroneously decide against a claimant on the ground that the notice of claim was insufficient, the Court would issue a Mandamus to him to adjudicate upon the claim: *R. v. Richards*, 2 L. M. & P., 263.

But, when a Judge of the County Court in England entered upon the hearing of a plaint, and from the evidence before him, decided that he had no jurisdiction to adjudicate between the parties, a Mandamus would not lie commanding him to hear and determine it, even though he might be wrong in point of law, and so would it be in our Division Courts: *Ex parte Milner*, 15 Jur., 1037.

Mandamus is only granted where there is no other legal remedy: *R. v. Chester (Dean and Chapter)*, 16 Q. B., 513; *In re Stratford and H. Ry. Co.* and *The Corporation of the County of Perth*, 38 U. C. R., 323. Except when there is no other mode of trying the questions conveniently: *R. v. Bedford Level (Corp.)*, 6 East, 356.

It was held, in England, that a motion for Mandamus could not be made by an applicant in person, unless he was a member of the Bar: *Ex parte Wason*, L. R., 4 Q. B., 573.

The omission in the writ of a necessary fact cannot be cured by the return: *R. v. South E. Ry. Co.*, 4 H. L. Cas., 471.

The Court in the exercise of its discretion as to issuing a Mandamus requires

that the application should be made by one who has a real interest in requiring the duties to be performed: *R. v. Peterborough, (Mayor)*, 44 L. J. Q. B., 85, 23 W. R., 343, 5 C.

When a rule was discharged with costs, on the ground that the affidavits were imperfect, and a second rule was obtained on the same ground on amended affidavits, the Court refused to hear the second application on the merits: *R. v. Pickles*, 12 L. J. M. C., 40.

Costs are usually granted against the unsuccessful party: 5 Mew's Digest, 113.

When a Mandamus will be ordered to County Court or Division Court Judges and officers: see L. & J., 2213-2215, 4615; Ont. Digest, 1884, 444, 445; Ont. Digest 1887, 426-427. On the subject generally and the practice of issuing the writ, reference is made to these pages and 5 Mew's Digest, 58-117: *R. v. Pirehill (Justices)*, 13 Q. B. D. 13; *R. v. Bangor (Mayor, &c.)* 18 Q. B. D., 349; Sinclair's D. C. Act, 1879, 22, 48; D. C. Law, 1885, 21; Wood (U. S.) on Mandamus; High (U. S.) on Legal Remedies; Tapping on Mandamus.

The different matters or causes of actions specially excluded from the jurisdiction of the Division Courts will be found hereinafter discussed. They are taken up in the order in which they appear in the Section, and such authorities as the writer has been able to discover on the different matters over which the Division Courts have no jurisdiction are given in the notes to this Section.

Gambling Debt.—We will proceed to consider what is a gambling debt within the meaning of this Section of the Statute. The question of what is a gambling debt was very fully reviewed by the late Chief Justice HARRISON in the case of *Bank of Toronto v. McDougall*, 23 C. P., 345. Much that it would have been necessary to say concerning the subject of gambling is so fully reviewed in that case that a mere reference to it is all that is necessary. Under the English law many things have been declared illegal by Statute which by our law, in the absence of such statutory enactment are not at all illegal. It is therefore for us to determine in the light of our law what is a gambling debt within the meaning of this Section.

A trotting match at 250, sterling, a side along a turnpike road was not held an illegal race in England: *Challand v. Bray*, 1 Dowl. N. S., 783.

So was a steeplechase: *Evans v. Pratt*, 4 Scott, N. R., 378.

A horse-race for 250, sterling, or upwards, if according to the Statute, is a legal race: *Bentinck (Lord) v. Gannop*, 5 Q. B., 693. See also 5 C. P., 182.

A lottery is an illegal game: *Clark v. Donnelly*, T. T. 5 and 6 Victoria.

Where the defendant sues for the plaintiff a pair of horses won by the plaintiff at a raffle and received the purchase money: *Held*, that he could not refuse to pay it over on the ground that the plaintiff had obtained the horses by gambling: *Jameson v. Sheppard*, 13 U. C. R., 282.

The Imperial Statute 37 Geo. II., chap. 28, against lotteries, is in force in this country: *Corby v. Vidmannel*, 18 U. C. R., 378; *Cronyn v. Widder*, 16 U. C. R., 356; *Marshall v. Platt*, 8 C. P., 189.

If a plaintiff wishes to avail himself of gambling as a defence to an action he must give notice under the Statute: *Wallbridge v. Becket*, 13 U. C. R., 395.

Securities given for the price of lottery tickets are not void in the hands of a bona fide holder for value: *Evans v. Morley*, 21 U. C. R., 547.

A lottery is clearly an illegal game: *Cronyn v. Widder*, 16 U. C. R., 356.

A sale of land by lottery is illegal: *Marshall v. Platt*, 8 C. P., 189.

A mortgage given for land sold at a lottery may be valid: *Cronyn v. Griffiths*, 18 U. C. R., 396; see also *Power v. Canniff*, 18 U. C. R., 403.

A contract made with a knowledge that it is the outcome of a lottery is void: *Loyd v. Clark*, 11 C. P., 248.

Lands obtained by way of lottery may under certain circumstances be liable to forfeiture: *Mowburn v. Street*, 21 U. C. R., 306, 498; *Goodeve v. Manners*, 5 Grant, 114.

Where, according to the rules of a race for 100 guineas, the decision of the stewards was to be final, and the plaintiff's horse won the first heat and came in first in the second but in consequence of alleged foul riding was adjudged by the stewards to have been distanced, another horse was pronounced the winner; *Held*, that the plaintiff could not contest such a decision nor maintain an action against the treasurer of the race who had not paid over the purse: *Gorham v. Boulton*, 6 O. S., 321.

The plaintiff and A bet upon a horse race and deposited the money with the defendant, a stakeholder. The bet was illegal, as neither of the parties owned either of the horses and they were not running for any other stake. A won and the defendant paid over the money on his order, having been previously notified not to do so. *Held*, that the plaintiff might recover back the amount from the defendant as money had and received: *Anderson v. Galbraith*, 16 U. C. R., 57; *Sheldon v. Law*, 3 O. S., 85; *Battersby v. Odell*, 23 U. C. R., 482.

Defendant was treasurer of a Turf Club by which horse races were conducted. He received subscriptions from members and others to form a fund out of which the purses run for were to be paid. The plaintiff entered a horse and won a purse, but the defendant refused to pay, alleging that the Club was indebted to him for advances which he had previously made. *Held*, that the plaintiff could not sue the defendant for money had and received, there being no privity between them, and the defendant being accountable only to the Club: *Simms v. Denison*, 28 U. C. R., 323.

A trotting match for £50, sterling, between two horses and sleighs on the ice is legal: *Fulton v. James*, 5 C. P., 182.

Where notice has been given to the stake-holder of an illegal wager not to pay over the stakes, is bound to return to the party who gave notice the money he deposited with the stake-holder, and if the stake-holder should pay it over after such notice, he would be held liable to return the same: *Hampden v. Walsh*, 1 Q. B. D., 189; *Diggle v. Higgs*, 2 Ex. D., 422.

In an action against the maker of a note for value, payable to bearer and transferred to the plaintiff for value after it was due, it was held, no defence to the plaintiff's transferrer that he received it in payment of a gambling debt: *R. & J.*, 533; *Burrry Marsh*, M. T., 4 Viet.

Gambling by a person who, subsequently claimed the benefit of the Insolvent Act, was held not fraud within the meaning of the Insolvent Act of 1864. It was doubtful whether gambling was fraud at all under that Act: *In re Jones*, 4 P. R., 317.

A foot-race is a lawful game: *Batty v. Marriott*, 5 C. B., 813.

A match at cricket for £50 a side was held illegal: *Hodson v. Terrill*, 1 C. & M., 797.

The game of hazard is an unlawful game, whether played in private or at a public gaming-table: *McKennell v. Robinson*, 3 M. & W., 434. See *Pearce v. Brooks*, L. R., 1 Ex., 213; *Bagot v. Arnott*, 2 Irish C. L., 1.

A cock fight is an illegal game: *Squires v. Whisken*, 3 Camp., 140. It is

now doubtful in view of recent legislation in England, whether cock fights are there illegal: *Martin v. Hewson*, 10 Ex., 737.

The game of dominoes is not an illegal game: *R. v. Ashton*, 1 E. & B., 286.

It is submitted that the game of billiards here is not, in itself, an unlawful game: *Parsons v. Alexander*, 1 Jur. N. S., 660.

Sweepstakes on a horse-race would be illegal: *Gatty v. Field*, 9 Q. B., 431.

It is submitted that a lottery upon a horse-race would also be illegal: *Allport v. Nutt*, 1 C. B., 974.

Where a party received money as Treasurer of a Derby lottery and gave tickets to each of the subscribers, it was held that the purchaser of such ticket had no right of action against such Treasurer, though the horse represented by his ticket was the winner: *Jones v. Carter*, 8 Q. B., 134.

It is submitted that any lottery is illegal: *Taylor v. Smetten*, 11 Q. B. D., 207.

A deed of land made in pursuance of a lottery is void: *Fisher v. Bridges*, 3 E. & B., 642.

According to Common Law of England, altered by 8 and 9 Vict., Chap. 109, (not in force in this Province), an action might be maintained on a wager although the parties had no previous interest in the question on which it was laid, if it was not against the interest or feelings of third persons, and did not lead to indecent evidence, and was not contrary to public policy: *Thackoor-seylass v. Dhoudmull*, 6 Moo., P. C., 300.

It is discretionary with a Judge whether he will, or will not, try an idle or frivolous case respecting a wager. If he suffers it to be tried, and the plaintiff obtains an illegal verdict, the Court will not on that account disturb it: *Robinson v. Mearns*, 6 D. & R., 26.

No action will lie on a wager respecting the mode of playing an illegal game, and if set down for trial, the Judge may refuse to try it: *Brown v. Leeson*, 2 H. Black, 43.

A Judge will refuse to try an action against the stake-holder to a dog fight: *Eagerton v. Furzman*, 1 C. & P., 613; or a wrestling match which did not take place: *Kennedy v. Gad*, 3 C. & P., 876.

A foot-race is under our law legal and valid, and neither the bettors can recover his stake from the stake-holders before the determination of the event: *Emery v. Richards*, 14 M. & W., 728. But it is illegal in England: *Diggle v. Higgs*, 2 Ex. D., 422.

The deposit with a stake-holder of an unlawful game is recoverable back: *Idem. Trimble v. Hill*, 5 App. Cas., 342.

A wager of more than £10, sterling, on a horse-race, already run, was not illegal under the Statute of 9 Anne, Chap. 14, Sec. 5: *Pugh v. Jenkins*, 1 Q. B., 691.

No action can be maintained against the loser of a debt of £10, sterling, for refusing to pay the same, though the bet has been a legal horse-race: *Thorpe v. Coleman*, 1 C. B., 990.

No right of action exists upon a legal race: *Martin v. Smith*, 4 Bing. N. C., 136; *Whaley v. Pajot*, 2 B. & P., 51; *Xlaenes v. Jaques*, 6 T. R., 499.

No action can be maintained by A against B on a wager in which A bets that B will, and B that he will not pass his examination as an attorney, inasmuch as B has the power of determining the wager in his own favor: *Fisher v. Waltham*, 4 Q. B., 889.

An illegal horse-race would be within the meaning of this Section: *Brogden Marriott*, 3 Bing. N. C., 88; *Coombs v. Dibble*, L. R. 1 Ex., 248.

An agreement in the nature of a bargain, but which is in reality a bet, is invalid: *Rourke v. Short*, 5 E. & B., 904.

The share of a depositor at a horse-race, where the horse upon which the depositor gave information won, it was held that he could not recover his share of the bet: *Higginson v. Simpson*, 2 C. P. D., 76.

A wager, under the disguise of a contract, to pay a reward for information given is illegal. *Idem*.

Where parties agree to settle a matter by a toss would equally be illegal.

Any transaction, which has for its object immorality, is against the policy of the law and is invalid: 3 *Mew's Digest*, 1951.

The employment of an agent to make a bet in his own name, on behalf of his principal, implies an authority to pay the bet if lost, and on the making of the bet that authority becomes irrevocable: *Read v. Anderson*, 10 Q. B. D., 100; 13 Q. B. D., 779, S. C.; *Bridger v. Savage*, 15 Q. B. D., 363; *Bubb v. Yelverton*, *In re Ker*, 24 L. T. N. S., 822.

Money paid in discharge of a lost bet, made for another, is recoverable from such other person: *Oldham v. Ramsden* 32 L. T. N. S., 825.

Money lent to enable the borrower to pay a bet, which he has already lost, would not, it is submitted, constitute an illegal consideration within the meaning of this Section, and would consequently be recoverable by the lender: *Ex parte Pyke*. *In re Lister*, 8 Ch. D., 754.

Money lent for the purpose of playing an illegal game would not be recoverable: *McKennell v. Robinson*, 3 M. & W., 434.

Money lent by a licensed innkeeper for the purpose of enabling a guest to play an unlawful game, contrary to his license, would not be recoverable back: *Foot v. Baker*, 5 M. & G., 335.

An agreement between a principal and his agent that the agent shall employ moneys of the principal in betting on horse-races, and pay over the winnings therefrom to his principal, was held not to be illegal: *Beeston v. Beeston*, 1 Ex. D., 13.

Money won at play or lent for the purpose of gambling in a country where the games are not illegal may be recovered in the Courts of this country: *Quarrier v. Colston*, 6 Jur., 959; *The Bank of Toronto v. McDougall*, 28 C. P., 345.

Where one of the parties to a bet repudiates it before the event is ascertained, and gives notice to the stake-holder, he is entitled to recover back his money: *Varney v. Hickman*, 5 C. B., 271; *Martin v. Hewson*, 10 Ex., 737; *Savage v. Madder*, 16 L. T. N. S., 600; *Graham v. Thompson*, 2 Ir. R. C. L., 64.

A stake-holder who receives bank notes as money and pays them over originally to the original stake-holder after he has lost the wager is answerable to the winner for money had and received to his use: *Pickard v. Bankes*, 13 East., 20. But if he pays over the money to the party who has won, he is not liable to repay it to any person whomsoever: *Brandon v. Hibbert*, 4 Camp., 37; *Brown v. Overbury*, 11 Ex., 715.

Where A and B deposit money in the hands of a stake-holder to abide the event of a boxing match, and when the better A claimed the whole sum from the stake-holder and threatened him with an action if he paid it over to B, which he nevertheless did by direction of the umpire; *Held*, that A was entitled to recover from him his own stakes, as money had and received to his use, on the ground of its being an illegal wager: *Hastelow v. Jackson*, 8 B. & C., 221. It would be otherwise if no notice was given. *Idem*.

To the same effect is *Diggle v. Higgs*, 2 Ex. D., 422; *Trimble v. Hill*, 5 App. Cas., 342; *Hampden v. Walsh*, 1 Q. B. D., 189.

Where money deposited on a bet has been paid over to the winner, with the consent of the loser, the latter cannot afterwards maintain an action against the winner to recover it back: *Howson v. Hancock*, 8 T. R., 575.

A and B jointly made bets with third persons on a horse-race, B received the money and gave A a bill, accepted by C, who was no party to the bet, for his share. It was held A would not be precluded from recovering the money upon the bill: *Johnson v. Lansley*, 12 C. B., 469.

The words "note of hand" in this Section may mean bill or cheque as well as a promissory note: *Lynn v. Bell*, 10 Ir. R. C. L., 487; *In re Summerfeldt v. Worts*, 12 Ont. R., 48.

In a legal race advertised to take place under certain conditions, the stakeholder cannot waive any of the conditions without the consent of the parties to the race: *Weller v. Deakins*, 2 C. & P., 618.

The conditions of a legal race must be closely observed: *Carr v. Martinson*, 1 E. & E., 456. That the reverse decision was without jurisdiction and void, see the same case: *Sadler v. Smith*, L. R., 4 Q. B., 214; *Dines v. Wolfe*, L. R., 2 P. C., 280.

On a bet that A will trot two horses 16 miles in two consecutive hours, he may trot them in any manner he thinks proper: *Robson v. Hall*, Peake, 127.

As to the jurisdiction and liability of stewards at horse-races, see 3 *Mew's Digest*, 1963.

The Ontario cases on the subject of illegal gaming or gambling will be found at pages 1620-1624 and 4506 of R. & J.'s Digest; Ont. Digest 1884, 308-310; Ont. Digest 1887, 296; and for a fuller reference to the English cases, see 3 *Mew's Digest*, 1921, 1945-1975.

"Gambling" includes playing billiards for beer, oysters or cigars: *State v. Bishel*, 39 Iowa, 42; *Hausberg v. People*, 35 Alb. L. J., 98.

A horse-race is a gambling device: *Joseph v. Miller*, 2 New Mexico, 621.

The Court said "The word 'gambling' is one of very general application, and is not restricted to wagering upon the result of any particular 'game or games of chance.' In the adjudicated cases on this subject we find that Judges often have applied this word indiscriminately to wagering of all kinds. We are unable to discover any distinction in general principle between the various methods that may be adopted for determining by chance who is the winner and who the loser of a bet—whether it be by throwing dice, flipping a copper, turning a card, or running a race. In either case it is gambling. This is the popular understanding of the term 'gambling device,' and does not include any scheme, plan or contrivance for determining by chance which of the parties has won and which has lost a valuable stake. That a horse-race, when adopted for such a purpose, is a 'gambling device' there can be no doubt: See *Shropshire v. Glascock and Garner*, 4 Mo., 536, and cases there referred to."

In *Kennon v. King*, 2 Montana, 437, it was ruled that it was a question for the Court and not for the Jury to decide whether the game of cards so called "poker" is generally a game of chance and within the Statute. This view is controverted in *Browne on Common Words and Phrases* at p. 143, 144.

A horse-race is a game of chance when the betting on it is made through an instrument called a "Pari Mutuel": *Tollett v. Thomas*, L. R., 6 Q. B., 514.

Backgammon as usually played is not a game of chance: *Wemmer v. State*, 55 Ala., 198.

Playing billiards where the loser pays is a game of chance: *Browne*, 146.

Betting on a horse-race is gaming: *Carson v. McGregor*, 57 Ill., 478.

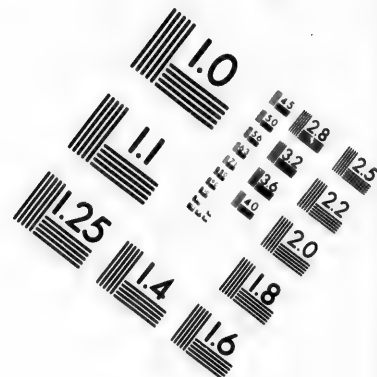
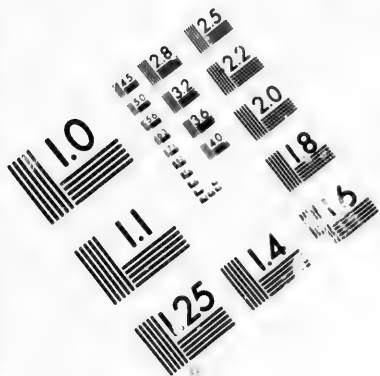
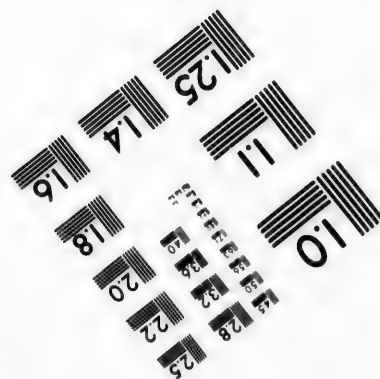
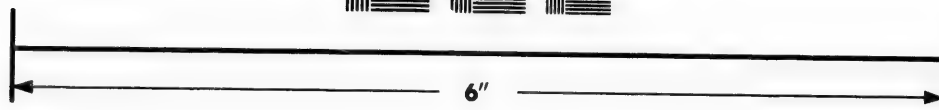
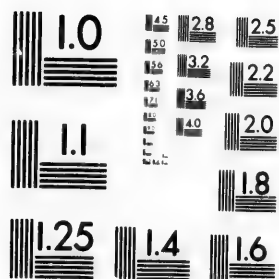


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Playing cards for amusement, without any bets or stakes, is not gaming: *Ansley v. State*, 36 Ark., 67.

Further on this subject, see Browne on the Interpretation of Common Words and Phrases, 148.

It will thus be seen that the opinion of the writer is that all bets are wagers and have for their object the injury of the feelings of private individuals not parties to the contract, or whether they are against the laws of morality or decency, or otherwise against public policy or prohibited by Act of Parliament, are within the meaning of this Section.

On the subject of want of Division Court Jurisdiction, under this head, see *Bank of Toronto v. McDougall*, 28 C. P., 351.

"Gambling in differences" upon the Stock Exchange was held sufficient to justify the dismissal of a servant: *Pearce v. Foster*, 17 Q. B. D., 536.

The plaintiff employed an agent for a commission to make bets for him on a horse, the agent accordingly made such bets and received the winnings from the persons with whom he so betted. In an action by the plaintiff for the amount which the agent had so received, the plaintiff was held entitled to recover in respect of the bets which had been paid by the defendant: *Bridger v. Savage*, 15 Q. B. D., 363.

Spirituos or Malt Liquors.—It will be observed that the jurisdiction of the Division Court is not excluded in an action for spirituous or malt liquors alone. Any person who has a lawful right to sell them may recover their price in the Division Court as for any other commodity, *provided* they are not "*drunk in a tavern or alehouse*." Whether they have been so or not is always a question for the Judge or jury to determine before proceeding with any other question in the case. If, after hearing all the evidence adduced on that point, and it be decided that the liquors were not drunk in a tavern or alehouse, and that the plaintiff otherwise had the right to sell the same, and the Judge determines that the Court had jurisdiction, the cause could not be prohibited. Another Court would not determine on application for Prohibition as to the correctness of his finding on the question of fact. It must be borne in mind that the right to sell such liquors in this Province is regulated by the Liquor License Act of Ontario (R. S. O., Chapter 181). Whenever a person had not the right to sell liquors by holding a license therefor, he would be disentitled to recover for the price of the same. A man cannot recover the price of that which he is by law prohibited from selling, because the consideration would be illegal: *McGlinchy v. Winchell*, 63 Maine, 31. The 49th Section of the Liquor License Act declares that "No person shall sell by wholesale or retail any spirituous, fermented, or other manufactured liquors without first having obtained a license under this Act authorizing him so to do; but this Section shall not apply to sales under legal process, or for distress, or sales by Assignees in Insolvency." The question whether liquors are "spirituous" or "malt" must be determined as any other question of fact: *Sinclair's D. C. Act*, 1879, 49; *Intoxicating Liquor Cases*, 25 Kansas, 751. *Browne*, 143, 144.

Sometimes much difficulty is experienced in determining whether liquors are really "spirituous" or "malt" liquors within the meaning of the Statute. In England and this Province the books give us very little information upon the determination of the Courts on that subject, or of the meaning to be attached to the words here used. In the United States we find that the ingenuity of the American mind has been more fruitful of device in trying to evade their liquor laws.

To be "found intoxicated" means drunk on spirituous liquors, and not on

opium, ether, or laughing-gas : *State v. Kelley*, 47 Vermont, 274. In *Mullinix v. People*, 76 Illinois, 211, the Court said "The word 'intoxicate' means to become inebriated or drunk, but intemperance does not necessarily imply drunkenness. It is defined to be the use of anything beyond moderation." Intoxicating liquors are defined by a Statute of Kansas "all liquors and mixtures by whatever name called that will produce intoxication." It was held there, as a question of fact, that it did not embrace medicines and toilet articles not ordinarily used as beverages, such as tincture of gentian, bay rum, and essence of lemon, although containing alcohol. Whether it embraces "McLean's Strengthening Cordial and Blood Purifier" (a mixture of whiskey, syrup of tula and syrup of wild cherry), and "Sherman's Prickly Ash Bitters," is a question of fact: *Intoxicating Liquor Cases*, 25 Kansas, 751. See also *Harris v. Jenns*, 9 C. B. N. S., 152. In the Kansas case it was said "Whether any particular compound or preparation of this class is then within or without the Statute is a question of fact to be established by the testimony, and determined by a jury."

Under the English Statutes there is a difference between "beer-shop" and "beer-house," the former being held ordinarily to mean a place where beer is sold to be drunk off the premises, and the latter a place where beer is sold to be drunk on the premises: *Bishop of St. Albans v. Battersby*, 3 Q. B. D., 359; *Holt v. Collyer*, 44 L. T. N. S., 214.

It was held in *Nevin v. Ladue*, 3 Denio, 450, by Chancellor WALWORTH, of the State of New York, in a very learned and amusing judgment, that "spruce beer, ginger beer and molasses beer may properly be termed fermented beer, but they are never considered 'strong liquors or intoxicating beverages.'" Ale and strong beer in the same case was held to be "spirituous liquors," but in *People v. Crilley*, 20 Barbour, 268, *State v. Adams*, 51 New Hamp., 568, and *State v. Moore*, 5 Blackf., 118, it was held that ale was not "spirituous liquor," because produced by fermentation and not by distillation. "Ale, beer, porter, rum, gin, brandy, whiskey and wine" were held to be "intoxicating liquors:" *State v. Wittmar*, 12 Missouri, 407. Lager-beer is a malt liquor: *State v. Goyette*, 11 Rhode Island, 592; *Watson v. State*, 55 Alabama, 158. And it is a "strong and malt liquor," and is intoxicating: *State v. Rush*, Rhode Island Sup. Court, 1881; *State v. Campbell*, 12 Rhode Island, 147. But it is for the jury to say whether it is intoxicating: *Rau v. People*, 63 N. Y., 277. It was held error for the Court to instruct the jury that beer necessarily meant a "malt liquor," *State v. Breswick*, Rhode Island, 1881, and that it was "purely a question of fact for the jury." See also *Harris v. Jenns*, 9 C. B. N. S., 152; *Browne on Words*, 143, 144, 205-208.

Generally, wine is an intoxicating liquor: *State v. Packer*, 80 North Carolina, 439. But not in Iowa when made from native grapes, currants or fruits: *Worley v. Spurgeon*, 38 Iowa, 465. In Indiana the Court does not know judicially whether or not wine is "intoxicating:" *Jackson v. State*, 19 Indiana, 312. Although they knew that "spirituous liquors" are: *Corman v. State*, 18 Indiana, 450.

Cider is not a "vinous liquor" *Feldman v. Morrison*, 1 Bradw. 460; vinous liquors being those made from grapes: *Adler v. State*, 55 Alabama, 16.

Whiskey is "intoxicating:" *Eagan v. State*, 53 Indiana, 162. It was held in *Winning v. Gow*, 32 U. C. R., 528, that "Old Tom Gin" was spirits. Spirits are spirits, though diluted with water: *Scott v. Gilmore*, 3 Taunt., 226. But sweet spirits of nitre are not "intoxicating:" *Atty. Gen'l v. Bailey*, 1 Ex., p. 292.

When strong drink ceases to be such, and becomes medicine, is discussed in *State v. Laffer*, 38 Iowa, 422. See also *Rogers' "Drinks, Drinkers and Drinking."*

A company under charter has no greater right to sell liquors than individuals

can possess, nor is it exempt from any legislative control to which they are subject: *Beer Company v. Massachusetts*, 97 U. S., 25.

It was held that if a person takes a house or part of a house, either in his own name or in the name of another person, and there personally, or by his agent, makes sale of spirits by retail, he carries on business there as a retailer of spirits, even though no spirits are actually stored on the premises: *Stallard v. Marks*, 3 Q. B. D., 412: Even though the store was kept in another town. *Idem*.

It is not unlawful for duly constituted clubs to sell intoxicating liquors by servants to their members by retail: *Graff v. Evans*, 8 Q. B. D., 373; *Newman v. Jones*, 17 Q. B. D., 132. See *Seim v. State*, 55 Maryland, 566; 25 Albany, L. J., 123, 222. In another case it was held that where the sale was by a druggist, as alleged to fill prescriptions, proof of other sales was admissible to shew intent by proof of prescription and the quantity of liquor it called for: *Dobson v. State*, 5 Lea (Tenn.), 271.

Unlawful intent was presumed from unlawful sale: *State v. Sartori*, 55 Iowa, 340. It was held in Iowa that a charge of selling whiskey was not sustained by shewing a sale of other intoxicating liquors: *State v. Hesner*, 55 Iowa, 494.

If there are several items in the bill, and the illegal ones are separable from the others, the legal items are recoverable: *Gilpin v. Rendle*, 1 Selwyn's N. P. 61. Where money is paid generally on account, without any specific appropriation at the time of payment, and part of the account is illegal (being a demand for liquor sold) and part legal, it is said the creditor would have the right to apply the money on the demand for liquor sold: *Phillpott v. Jones*, 2 A. & E., 41; *Crookshank v. Rose*, 5 C. & P., 19; *Simson v. Ingham*, 2 B. & C., p. 72; *Hooper v. Keay*, 1 Q. B. D., 178; *Kinnaird v. Webster*, 10 Ch. D., 139; *Addison on Contracts*, 8th Ed., 1211, 1212.

Cross demands may be settled even though there is a claim for liquor in one of them, and not recoverable for. It is only the right to recover that which the Statute bars, not the right to pay for them: *Dawson v. Remnant*, 6 Esp., 24.

Additions to licensed premises do not destroy their character; the question always is, are they substantially the same: *R. v. Raffles*, 1 Q. B. D., 207; *R. v. Smith*, 15 L. T. N. S., 178.

A covenant not to use a house as a "beer-house, inn, or public-house, for the sale of spirituous liquors," is not infringed by the sale of beer by retail to be drunk off the premises: *London & N. W. Ry. Co., v. Garnett*, L. R., 9 Eq., 26.

A sale as a grocer would not be within the covenant: *Jones v. Bone*, L. R., 9 Eq., 674; *Holt v. Collyer*, 16 Ch. D., 718. But see *Bishop of St. Albans, v. Battersby*, 3 Q. B. D., 359.

A "tavern" is defined to be "A house licensed to sell liquors to be drunk on the spot, with accommodation and entertainment for travellers": *Nuttall's Standard Dictionary*. An ale-house is defined to be "A house where ale and beer are sold": *Worcester*.

The latter authority defines "tavern" to be "A public house where wine and liquors are sold and entertainments for a party are provided. An Inn."

It must always be kept in view that in order to oust the jurisdiction of the Court on this ground, the liquors sued for must be drunk in one or the other of the places mentioned in this section.

In some Statutes a statutory interpretation is given to the word "liquors," as under the Liquor License Act, but in the clause under consideration no such meaning is given to it. So the meaning to be given to the language employed will have to be gathered from the ordinary rules of statutory inter-

pretation. As to the meaning under some Statutes to the word "liquors," reference may be had to the case of *Northcote v. Brunker*, 14 App. R., 364.

The illegal sale of liquors to any one not entitled to buy the same—for instance, to an apprentice, or minor, or other prohibited person—would be within the prohibitive part of the Statute: See *In re Greystock and The Municipality of Otonabee* 12 U. C. R., 458; *In re Ross v. The Corporation of York and Peel*, 14 C. P., 171; *In re Brodie and The Corporation of Bowmanville*, 38 U. C. R., 580; *In re Arkell and St. Thomas*, 38 U. C. R., 594; *Commonwealth v. Briant*, 34 Alb. L. J., 489.

A sale to an Indian would be invalid and punishable: R. S. C., 677-680; *R. v. Mackenzie*, 6 Ont. R., 165; *R. v. Young*, 7 Ont. R., 88.

Ignorance is no defence on a sale of liquor to a minor: *Redmond v. State*, 36 Arkansas, 58; *Crampton v. State*, 37 Arkansas, 108.

As to a sale by a clerk or partner to a minor, see *Hale v. State*, 36 Arkansas, 150, 151; *Johnson v. State*, 74 Indiana, 197; 7 App. R., 478; 20 C. P., 246.

The mere fact that a person says he wants the liquor as a medicine will not exonerate a druggist from the charge of selling it as a beverage, nor entitle the druggist to sue for it in the Division Court: *State v. Knowles* (Iowa), 11 N. W. Rep., 620.

As to sale by druggists, see *Commonwealth v. Ramsdell*, 25 Alb. L. J., 365; *Wright v. People*, 101 Illinois, 126.

A licensed dealer may sell the liquor of another who has no license: *State v. Keith*, 37 Arkansas, 96, 98, 117, 272.

Liability of principal for acts of his agent: see 73 Missouri, 181; and *Austin v. Davis*, 7 App. R., 478; *R. v. King*, 20 C. P., 246.

It was held in *People v. Parks*, 13 N. W. Rep., 618, that a liquor dealer could not be held criminally responsible for sales by his clerk to an habitual drunkard: See also 36 Alb. L. J., 354.

Generally as to selling liquor without having a license so to do, and the consequences thereof, see *The Liquor License Act of Ontario*; R. & J., 3702-3720, 4715; Ont. Digest 1884, 753; Ont. Digest 1887, 357; 4 Mew's Digest 1082-1136.

As to the meaning of the words "intoxicating liquor," see *Browne* (U. S.) on the *Judicial Interpretation of Words*, 205-208.

The meaning of "a drink": *Idem*, 106.

"Intemperate habits": *Idem*, 197-203. "Intoxicated": *Idem*, 204, 205.

"Spirituos and intoxicating liquors": *Idem*, 436-438.

Whiskey and tobacco are not "victuals" or "clothes": *Wisehart v. Grose*, 71 Indiana, 264.

Selling a single drink was held to be not "carrying on the business": *Lawson v. State*, 55 Ala., 118; L. R., 2; C. P., 270; *R. v. Andrews*, 25 U. C. R., 196;

As to notice forbidding sale of intoxicating liquors, see *Northcote v. Brunker*, 14 App. R., 364; *Taylor v. Carroll*, 5 New Eng. Rep. 122; *Commonwealth v. Harper*, 5 New Eng. Rep., 117; 1 *Lawyers' Co-operative Index* No. 6, pages 6, 7; 5 New Eng. Rep. 170, 177, 188, 155, 211. Sale by agent: 5 New Eng. Rep., 268, 281.

Illegal Promissory Notes.—It will be observed that "notes of hand," by which is evidently meant promissory notes, cheques and "all evidences of debt under

the hand of the debtor," given for any of the prohibited matters or things are not within the jurisdiction of the Division Court: *In re Summerfeldt v. Worts*, 12 Ont. R., 48.

In three cases there is no jurisdiction under this sub-section: (1) for any gambling debt; (2) actions for spirituous or malt liquors drunk in a tavern or ale-house; (3) actions on notes of hand given *wholly or partly* in consideration of a gambling debt, or for such liquors. Whenever it is found that the note is given even in part for any of these considerations, jurisdiction is gone. See also *Harper v. Young*, 34 Albany, L. J., 376; 34 Albany, L. J., 344.

The "note of hand" is not suable in the Division Court, even though in the hands of an innocent holder: *In re Summerfeldt v. Worts*, 12 Ont. R., 48; *Harper v. Young*, *supra*. But in another Court it would possibly be: *Bowen v. Webber*, 34 Albany, L. J. 76; *The Canadian Bank of Commerce v. Gurley*, 30 C. P., 583; *Addison on Contracts*, 8th Ed., 1135-1185; *Bytes on Bills*, 9th Ed., 131-140; 1 *Mew's Digest*, 1747-1780; R. & J., 521-533; Ont. Digest, 1884, 79-81; Ont. Digest, 1887, 49, 50; *Sinclair's D. C. Act*, 1879, 49; *Broom's Com. Law*, 7th Ed., 449; L. R. Digest, 1880, 657, 3421; L. R. Digest, 1885, 1276; *Chitty on Con.*; *Anson on Con.* As to what constitutes a good endorsement of a valid bill or note, see *Denton v. Peters*, L. R., 5 Q. B., 475.

Actions for Recovery of Land.—The language of this sub-section has been somewhat changed to make it more consistent with the Ontario Judicature Act. Under the former Act the words were "Actions of Ejectment:" *Sinclair's D. C. Act*, 1879, 50.

The meaning is substantially the same, and wherever jurisdiction was formerly excluded as virtually being an action of ejectment, so also is jurisdiction excluded under this Section.

The reader is referred to *Sinclair's D. C. Act*, 1879, 50, 52; *Cole on Ejectment*, 3 *Mew's Digest*, 821-885; R. & J., 1168-1214; Ont. Digest, 1884, 228-231; Ont. Digest, 1887, 209; and generally the notes to this Section, especially those referring to "Jurisdiction" and "Prohibition."

Corporeal and Incorporeal Hereditaments.—"Corporeal hereditaments are fixed as to their definition by the legal maxim that at common law they lie in livery, and not in grant. The phrase therefore includes only lands regarded as a physical object, and legal estates of inheritance in possession. The only conveyance *in pais*—that is, made between party and party, and not matter of record, as a fine or recovery—by which these could at common law be conveyed to a stranger, was a feoffment, and the essence of a feoffment is the livery of the seisin. All other hereditaments, to which applies the description, *tangi non possunt nec videri*, are included under the term *incorporeal hereditaments*. These are said at common law to lie in grant; because they would pass by the mere delivery of a deed purporting to convey them, and the word *grant* was the most appropriate (though not the only) word of conveyance for the purpose.

"The importance of the distinction between corporeal and incorporeal hereditaments has been diminished by 8 & 9 Vict. c. 106, s. 2 (R. S. O. c. 98, s. 2); which enacts that after 1st October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery."—*Challis on Real Property*, 36, 37.

Indeed, the right to try the question of title of any kind to land, or which may be considered part of it, in the Division Courts is entirely excluded. The previous notes to this Section, and Sinclair's D. C. Act, 1879, 50, 52, will be found somewhat made up of this question.

The jurisdiction of the Court would not be ousted if the question of title to land *incidentally* arose. For instance, should the title arise in an action of Replevin, as in *Fordham v. Akers*, 4 B. & S., 578, or in an Interpleader issue, as in *Munsie v. McKinley*, 15 C. P., 50, or probably to show that a married woman was capable of contracting so as to bind her separate property: *In re Widmeyer v. McMahon*, 32 C. P., 187; *In re Shakespear*, *Deakin v. Lakin*, 30 Ch. D., 169; *Palliser v. Gurney*, 19 Q. B. D., 519; it would not oust the jurisdiction, nor in some cases in the County Court was jurisdiction ousted by that question: *Rae v. Trim*, 8 P. R., 405.

Where a case is brought in the Division Court in which there is a want of jurisdiction, a plaintiff can now be made to pay the costs of the action. See Section 207, sub-section (2) hereto.

Toll.—The meaning to be attached to the words—"Toll, Custom or Franchise"—will be found explained in Sinclair's D. C. Act, 1879, 52.

The "toll" to be valid must stand upon some legal right to do something beneficial to the person to be charged with the toll: *Jenkins v. Harvey*, 5 Tyr., 871; *Laybourn v. Crisp*, 4 M. & W., 320.

A toll for the mere use of a public way is bad: *Lawrence v. Hitch*, L. R., 3 Q. B., 521. A party may be exempt from the toll either by Statute or Charter: *Middleton (Lord) v. Lambert*, 1 A. & E., 401. A toll may also be founded on immemorial usage: *Pelham (Lord) v. Pickersgill*, 1 T. R., 660. It is for the person who sets up a toll to shew its existence: *R. v. Salisbury (Marquis)*, 8 A. & E., 716; *Brecon Markets Co. v. Neath & Brecon Ry. Co.*, L. R., 7 C. P., 555; L. R., 8 C. P., 157; *Newmarket Ry. Co. v. Foster*, 2 C. L. R., 1617; *G. Eastern Ry. Co. v. Harwich*, 41 L. T. N. S., 533.

Toll for the mere use of a bridge cannot be let by parol; it must be by deed: *R. v. Salisbury (Marquis)*, 8 A. & E., 716. See also *Swatman v. Ambler*, 8 Ex., 72.

A private person or a company having a right to levy tolls in respect of the performance of a particular work will be liable for injuries occasioned by performing it improperly: *Mersey Dock Trustees v. Gibbs*, 14 L. T. N. S., 677.

Where a Company is entitled to a mileage toll, sometimes it is authorized to take toll for part of a mile: *Medway Navigation v. Brook*, 33 L. T. N. S., 843; see *Pryce v. Monmouthshire Canal & Ry. Companies*, 4 App. Cas., 197.

Before toll can be taken sometimes publication of it is necessary: *Gregson v. Potter*, 4 Ex. D., 142.

A toll reasonable in amount, but varying from time to time, according to the value of money, is valid in point of law: *Lawrence v. Hitch*, L. R., 3 Q. B. 521.

As to the alteration and variation of tolls, see *Lancum v. Lovell*, 6 C. & P., p. 463; *Barton v. Bennett*, 12 W. R., 709; *Hungerford Market Co. v. City Steamboat Co.*, 3 L. T. N. S., 732.

A mere claim of a right to take tolls without showing clearly that it is a *bona fide* claim is not sufficient to oust Justices of the jurisdiction to convict for taking them improperly: *R. v. Hampshire (Justices)*, 3 Dowl., 47.

Indebitatus assumpsit lay for fish claimed as a toll for the use of a capstan

and windlass in drawing fishing boats upon the beach of the sea: *Falmouth (Earl) v. Penrose*, 9 D. & R., 452.

A power of distress for toll implies an antecedent right of action: *Great E. Ry. Co. v. Harwich (Mayor)*, 41 L. T. N. S., 533. See *Danforth's (U. S.) Digest* 1115.

"Custom."—A custom is void which is unreasonable and uncertain; it savors too much of arbitrary power, and tends to make a man too much of a Judge in his own case: *Wilkes v. Broadbent*, 1 Wilson, 63. It is no objection to a custom, otherwise good, that it is not conformable to the common law of the land: *Horton v. Beckman*, 6 T. R., 760, 764. A claim of custom which is unreasonable cannot be supported: *Clayton v. Corby*, 5 Q. B., 415; *Rogers v. Brenton*, 10 Q. B., 26; *Hilton v. Granville (Earl)*, 5 Q. B., 701; *Bastard v. Smith*, 2 M. & Rob., 129.

The right to the whole of a given substratum of coal lying under a close is a right to land; a right to coal is different: *Wilkinson v. Proud*, 11 M. & W., 33.

A right of custom to fish for oysters, having always been by license, could not give rise to a custom, however general or long continued: *Mills v. Colchester (Mayor)*, L. R., 2 C. P., 476; L. R., 3 C. P., 575. See *Free Fishers of Whitstable v. Foreman* L. R., 3 C. P., 578.

A custom as to marriage fees: See *Bryant v. Foot*, L. R., 3 Q. B., 497.

A custom by immemorial usage must be shewn to be good: *Simpson v. Wells*, L. R., 7 Q. B., 214.

A custom cannot vary or alter the construction of written documents: *Menzies v. Lightfoot*, L. R., 11 Eq., 459.

A custom to control the words of a covenant in a deed must be one which both parties to the covenant can know, and must be certain and invariable: *Abbott v. Bates*, 33 L. T. N. S., 491. See also *The Alhambra*, 6 P. D., 68; *Hayton v. Irwin*, 5 C. P. D., 130. As to a custom in Ontario, see *Grand Hotel Co. v. Cross*, 44 U. C. R., 153.

As to the customs in England respecting parishes and towns, public sports and games, and other matters of a local nature not having the force of law here, reference is made to 3 *Mew's Digest*, 15-29; *Cooley on Taxation*, 3.

As to custom and usage in trade in this Province, the reader is referred to R. & J., 980-983; *Ont. Digest*, 1884, 196; *Ont. Digest*, 1887, 173, 174; *Broom's Com. Law*, 7th Ed., 10, 13-21, 513; *Danforth's (U. S.) Digest*, 302.

Franchise.—The meaning to be attached to the word "*franchise*" is shortly given at page 52 of *Sinclair's D. C. Act*, 1879.

In the last edition (1886) of *Nuttall's Standard Dictionary*, 299, a more extensive meaning is given to the word. It is there said to be "A particular privilege or right granted by a Prince or Sovereign to an individual, or to a number of persons; an immunity so granted; the district or jurisdiction to which a particular privilege extends; the limits of an immunity; an asylum or sanctuary where persons are secure from arrest; the right to vote for a member of Parliament."

In this country and the United States of America franchises are generally granted by an Act of the Legislature, or is part of the Fundamental Law.

For instances of the different kinds of franchise the reader is referred to 2 *Mew's Digest*, 1166-1300; 3 *Mew's Digest*, 887, *et seq.*; *Danforth's (U. S.) Digest*, 254-279; *Municipal Institutions Act of Ontario*; *Election Law of Ontario*; *Hedgins on Voters Lists*, 7, 74, 129, 141. Any unlawful inter-

ference with a franchise by which damage is occasioned is actionable : Pollock on Torts, 134, 270, 271.

"Generally speaking, every wilful interference with the exercise of a franchise is actionable without regard to the defendant's act being done in good faith, by reason of a mistaken notion of duty or claim of right, or being consciously wrongful. 'If a man hath a franchise and is hindered in the enjoyment thereof, an action doth lie, which is an action upon the case.' But persons may as public officers be in a quasi-judicial position in which they will not be liable for an honest though mistaken exercise of discretion in rejecting a vote or the like, but will be liable for a wilful and conscious, and in that sense, malicious, denial of right. In such cases the wrong, if any, belongs to the class we have just been considering." *Idem*.

See on the subject generally *Pearce v. Scotcher*, 9 Q. B. D., 162; *Goodman v. Mayor of Saltash*, 7 App. Cas., 633; *Reece v. Miller*, 8 Q. B. D., 626; *Foster v. Wright*, 4 C. P. D., 488; *Mayor of Carlisle v. Graham*, L. R., 4 Ex., 361; *Northumberland (Duke) v. Houghton*, L. R., 5 Ex., 127; *Bristow v. Cormican*, 3 App. Cas., 641; *Ashby v. White*, 1 Smith's L. C.

Validity of Devise, &c., Disputed.—Whenever there is any dispute as to the validity of any devise, bequest or limitation under any will or settlement, then the jurisdiction of the Division Court to inquire into the same is at an end.

A higher Court is considered the proper place to litigate such questions : See 2 *Mew's Digest*, 1443; *Jarman on Wills*; *Hayes & Jarman on Wills*; *Walkem on Wills*; *Theobald on Wills*, and *Lewin on Trusts*.

Malicious Prosecution.—As to this cause of action, the reader is referred to *Sinclair's D. C. Act*, 1879, 53. Since that work was written, an eminent authority on the law of Torts has expressed himself as follows :

"A party who sets the law in motion without making its act his own is not necessarily free from liability. He may be liable for malicious prosecution (of which hereafter); but he cannot be sued for false imprisonment, or in a Court which has not jurisdiction over cases of malicious prosecution. 'The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a Magistrate, one makes a charge against another, whereupon the Magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and the judgment of a judicial officer are interposed between the charge and the imprisonment.' Where an officer has taken a supposed offender into custody of his own motion, a person who at his request signs the charge-sheet does not thereby make the act his own any more than one who certifies work done under a contract thereby makes the contractor his servant. But where an officer consents to take a person into custody only upon a charge being distinctly made by the complainant, and the charge-sheet signed by him, there the person signing the charge-sheet must answer for the imprisonment as well as the officer.

"Again, where a man is given into custody on a mistaken charge, and then brought before a Magistrate, who remands him, damages can be given against the prosecutor in an action for false imprisonment only for the trespass in arresting, not for the remand, which is the act of the Magistrate.

"What is reasonable cause of suspicion to justify arrest is—paradoxical as

the statement may look—neither a question of law nor of fact. Not of fact, because it is for the Judge and not for the jury; not of law, because 'no definite rule can be laid down for the exercise of the Judge's judgment.' It is a matter of judicial discretion, such as is familiar enough in the classes of cases which are disposed of by a Judge sitting alone: but this sort of discretion does not find a natural place in a system which assigns the decision of facts to the jury and the determination of the law to the Judge. The anomalous character of the rule has been more than once pointed out and regretted by the highest judicial authority. But it is too well settled to be disturbed unless by legislation. The only thing which can be certainly affirmed in general terms about the meaning of 'reasonable cause' in this connexion is that on the one hand a belief honestly entertained is not of itself enough; on the other hand, a man is not bound to wait until he is in possession of such evidence as would be admissible and sufficient for prosecuting the offence to conviction, or even of the best evidence which he might obtain by further inquiry. 'It does not follow that because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so.' It is obvious, also, that the existence or non-existence of reasonable cause must be judged, not by the event, but by the party's means of knowledge at the time."—Pollock on Torts, 191-194. *Austin v. Dowling*, L. R., 5 C. P., 540. *per WILLES, J.*; *Grinham v. Willey*, 4 H. & N., 496; *Lock v. Ashton*, 12 Q. B., 571; *Hailes v. Marks*, 7 H. & N., 556; *Lister v. Perryman*, L. R., 4 H. L., 521; *Hope v. Evered*, 17 Q. B. D., 338; *Vandervoort v. Youker*, 13 Ont. R. 417; *Hicks v. Faulkner*, 8 Q. B. D., 167.

The writer does not see any reason why an action for False Imprisonment where the damages do not exceed \$60 may not be brought in the Division Court against any one but a Justice of the Peace (if he objects thereto). As to this form of action (False Imprisonment) see Pollock on Torts, 188; R. & J., 2187, *et seq.*, 1970, 4613; Ont. Digest, 1884, 442; Ont. Digest, 1887, 417; *Emerson v. Cochran*, 34 Alb. L. J., 138; *Teal v. Fissel*, 34 Alb. L. J., 277; *Parkhurst v. Mastellar*, 13 Iowa Rep., 656; *The Index Reporter*, Vol. 1, 266, and cases cited; Pollock on Torts, 51, 136, 191, 214, 229, 234, 260, 453; 5 Mew's Digest, page 2, *et seq.*; *Jenner v. Carson*, 10 West. Rep., 809. If a defendant believed from facts which would induce a man of ordinary caution to believe plaintiff guilty, there was probable cause: *Donnelly v. Barkett*, Iowa Sup. Ct., Oct. 12th, 1887. When an information is laid in good faith upon the advice of counsel, the defendant is not liable: *Mesher v. Iddings*, Iowa Sup. Ct., Oct. 12th, 1887; *Donnelly v. Daggett*, 5 New Eng. Rep., 282; *Broom's Com. Law*, 7th Ed., 380, 764-768; L. R. Digest, 1880, 2365, 2366; L. R. Digest, 1885, 853, 855; *Hicks v. Faulkner*, 8 Q. B. D., 167.

Libel.—"It is enough to make a written statement *prima facie* libellous that it is injurious to the character or credit (domestic, public, or professional) or the person concerning whom it is uttered, or in any way tends to cause men to shun his society, or to bring him into hatred or contempt, or ridicule. When we call a statement *prima facie* libellous, we do not mean that the person making it is necessarily a wrong-doer, but that he will be so held unless the statement is found to be within some recognized ground of justification and excuse."—Pollock on Torts, 206, 207. *Ogden on Libel and Slander*, 3 Mew's Digest, 184-314; *McLay v. Cor. Bruce*, 14 Ont. R., 398; *Hussey v. King*, 37 Alb. L. J., 56; *Hayward v. Hayward*, 34 Ch. D., 198; *Poulett v. Chatto*, W. N., 1887, 192, 230; *Liverpool Household Stores Ass. v. Smith*, W. N., 1887, 195, 208; *Merivale v. Carson*, W. N., 1887, 227; *Helmore v. Smith*, 35 Ch. D., 449; *Hatchard v. Mege*, 18 Q. B. D., 771; *Shortt on Libel*; *Elliott on Libel*; *Starkie on Libel and Slander*; *Taylor on Ev.*, 8th Ed., 1709, 1710, and pages there quoted; *Broom's Com. Law*, 7th Ed., 1079, and pages there cited.

Slander.—"Slander is an actionable wrong when special damage can be shewn to have followed from the utterance of the words complained of, and also in the following cases:—Where the words impute a criminal offence; where they impute having a contagious disease which would cause the person having it to be excluded from society; where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession or trade, in short, where they manifestly tend to prejudice a man in his calling. Spoken words which afford a cause of action without proof of special damage are said to be actionable *per se*: the theory being that their tendency to injure the plaintiff's reputation is so manifest that the law does not require evidence of their having actually injured it. There is much cause, however, to deem this and other like reasons given in our modern books mere after-thoughts, devised to justify the results of historical accident: a thing so common in current expositions of English law that we need not dwell upon this example of it."—Pollock on Torts, 206. See also Odgers on Libel and Slander; 8 Mew's Digest, 184-314; Addison on Torts; Taylor on Ev., 8th Ed., 1709, 1710, and pages cited; R. S. O., Chap. 56; 50 Vict., Chap. 9.

Criminal Conversation.—"Against an adulterer the husband had an action at Common Law, commonly known as an action of Criminal Conversation. In form it was generally trespass *vi et armis*, on the theory that 'a wife is not, as regards her husband, a free agent or separate person,' and therefore her consent was immaterial, and the husband might sue the adulterer as he might have sued any mere trespasser who beat, imprisoned or carried away his wife against her will. Actions for Criminal Conversation were abolished in England on the establishment of the Divorce Court in 1857, but damages can be claimed on the same principles in proceedings for a dissolution of marriage or judicial separation."—Pollock on Torts, 196, 197. R. & J., 900, 1681.

In Ontario the law is the same as it was in England before the Divorce Court was established there. Strict proof of the marriage in such case is necessary: Taylor on Ev., 8th Ed., 190, 191. In England the action is not now maintainable: Broom's Com. Law, 7th Ed., 885.

Seduction.—This cause of action is also excluded from the jurisdiction of the Division Court. Mr. Pollock, in his work on Torts, says: "There seems, in short, no reason why this class of wrongs [Seduction] should not be treated by the Common Law in a fairly simple and rational manner, and with results generally not much unlike those we actually find, only free from the anomalies and injustice which flow from disguising real analogies under transparent but cumbrous fictions. But as matter of history (and pretty modern history) the development of the law has been strangely halting and one-sided. Starting from the particular case of a hired servant, the authorities have dealt with other relations, not by openly treating them as analogous in principle, but by importing into them the fiction of actual service; with the result that in the class of cases most prominent in modern practice, namely, actions brought by a parent (or person *in loco parentis*) for the seduction of a daughter, the test of the plaintiff's right has come to be, not whether he has been injured as the head of a family, but whether he can make out a constructive 'loss of service.'"—Pollock on Torts, 195. R. S. O. Chap. 57; R. & J., 3465-3475, 471. 472; Ont. Digest 1884, 728; Ont. Digest 1887, 629-631; Meyer v. Bell, 13 Ont. R., 35; Appleby v. Franklin, 17 Q. B. D., 93; Broom's Com. Law, 7th Ed., 86, 180, 371, 886, 887; 5 Mew's Digest, 245-250; Smith's Master and Servant, 174-181; Taylor on Ev., 8th Ed., 1778, and pages cited; Roscoe's N. P. Ev., title "Seduction."

Breach of Promise of Marriage.—It will be seen, too, that the action for breach of promise of marriage is also specially excluded from Division Court

Cases in
which
the Court
has juris-
diction.

70. (r) (1) The Division Courts shall have jurisdiction in the following cases:

- (a) All personal actions where the amount claimed does not exceed \$60. R. S. O. 1877, c. 47, s. 54 (1); 43 V. c. 8, s. 3.
- (b) All claims and demands of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed \$100. 41 V. c. 8, s. 6.
- (c) All claims for the recovery of a debt or money demand, the amount or balance of which does not exceed \$200 and the amount or original amount of the claim is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents. 43 V. c. 8, s. 2, *part*.

and except in cases in which a jury is legally demanded by a party as hereinafter provided,

jurisdiction. It is not proposed to say anything on this form of action, but only to cite where the law may be found bearing upon the subject: Add. on Con., 8th Ed., 834-864; R. & J., 2227, 1664; Ont. Digest, 1884, 318; Ont. Digest, 1887, 306; 4 Mew's Digest, 48-54; L. R. Digest, 1880, 1788-1793; L. R. Digest, 1885, 653-656; Broom's Com. Law, 7th Ed., 124; Roscoe's N. P. Ev., 13th Ed., 468; Taylor on Ev., 8th Ed., 1628, and pages cited.

Action against a J. P.—No action can be brought against a Justice of the Peace in the Division Court for anything done by him in the execution of his office, if he objects thereto: See Sinclair's D. C. Act, 1879, 53.

The notice which the Justice may give must, we think, be in writing now: Sinclair's D. C. Law, 1885, 197. See Section 93 hereto.

Having been given by him it cannot be withdrawn: *Weston v. Sneyd*, 1 H. & N., 703.

If the action be brought in any other Court, and a recovery only within the jurisdiction of the Division Court, the plaintiff can only have costs on the scale of that Court: *Ireland v. Pitcher*, 11 P. R., 403; Broom's Com. Law, 7th Ed., 756-759, 995-998.

(r) See Sinclair's D. C. Act, 1879, 60-69, and D. C. Act, 1880, 2-12; Sinclair's D. C. Act, 1886, 13-20, in regard to this Section.

The first sub-section gives jurisdiction to the Division Courts in "all personal

the Judge shall hear and determine in a summary way all questions of law and fact and may make such orders or judgments as appear to him just and agreeable to equity and good conscience, which shall be final and conclusive between the parties, except as herein otherwise provided. R. S. O. 1877, c. 47, s. 54; *part*.

(2) In the class of cases provided for by paragraph (c) of the preceding sub-section, the increased jurisdiction thereby conferred shall apply to claims and proceedings against absconding debtors under section 249, and subsequent sections of this Act; and in such cases the attachment may issue and proceedings may be had on a claim of not less than \$4 and not more than \$200. 43 V. c. 8, s. 4.

(3) Claims combining :

(a) A cause or causes of action in respect of which the jurisdiction of the Division Courts, is by the foregoing sub-sections of this section, limited to \$60, which causes of action are hereinafter designated as class (a) and

(b) A cause or causes of action in respect of which the jurisdiction of the said Courts is by the said sub-sections limited to \$100, which causes of action are hereinafter designated as class (b)

actions" where the amount claimed does not exceed \$60. The increased jurisdiction was originally given in the Act of 1880, now being consolidated in the present Section.

The meaning which has to be given, according to the views of the writer, to the words "all personal actions," will be found at page 60, *et seq.*, of Sinclair's 1st Ed., 1879.

In addition thereto, we have to say that all wrongs of a personal nature—all wrongs to property and wrongs to person, estate and property generally—are the subject of "personal actions" and of Division Court jurisdiction, except such as are excluded by direct legislation. See the notes to Section 69 and Pollock on Torts, 7. No work do we know of where any legal definition is given

(c) A cause or causes of action in respect of which the jurisdiction of the said Courts is by the said sub-sections limited to \$200, which causes of action are hereinafter designated as class (c)

may be tried and disposed of in one action, and the said Courts shall have jurisdiction so to try the same; provided that the whole amount claimed in any such action in respect of class (a), shall not exceed \$60; and that the whole amount claimed in any action in respect of classes (a) and (b) combined, or in respect of class (b) where no claim is made in respect of class (a), shall not exceed \$100, and that the whole amount claimed in respect of classes (a) and (c) or (b) and (c) combined, shall not exceed \$200, and that in respect of classes (b) and (c) combined, the whole amount claimed in respect of class (b) shall not exceed \$100.

(4) The finding of the Court upon the claims when so joined as aforesaid shall be separate. 49 V. c. 15, s. 6.

to the words "personal actions" as used in this Section, nor do we know of any that is inconsistent with the meaning which in the work we have referred to these remarks have been made.

In torts the principle of agency does not apply; each wrong-doer is a principal. See the Ontario Industrial Loan and Investment Co. v. Lindsey, 4 Ont. R., 473. A husband and wife may be jointly liable for a tort: Barker v. Westover, 5 Ont. R., 116.

It would take several books in which to discuss the different branches of the law in respect to personal actions, so that in addition to the views which we have expressed, the reader must take up each different part of the subject according to the nature of his case, and investigate it in the light of and with the aid of well known works and Digests. The subject is extensive, and no summary of judicial views would be of much service to the reader.

Judge shall try Causes himself.—The Judge of the Division Court shall try all actions except where by some Statute a jury is authorized to be called. At one time a jury was not allowed in Interpleader cases: Munsie v. McKinley, 15 C. P., 60. But now, under the increased jurisdiction of the Division Courts, it is. See Sinclair v. D. C. Law, 1884, 269, 270, and pages there cited. See Section 155 hereto.

Increased Jurisdiction.—It applies to the law relating to Absconding Debtors. If a party has a right to commence a suit for \$200, that claim may be made the subject of Division Court jurisdiction under the clauses relating to Absconding Debtors under this Act.

It must be observed that an "Absconding Debtor," under the general Act relating to Absconding Debtors is not the same as under the Division Courts Act.

In the latter the rights of creditors appear to be more extensive. Compare the Sections.

Combining Causes of Action.—This is a new provision in Division Court law. It will be found discussed at length in Sinclair's D. C. Act, 1886, 13-20.

The experience of the writer of these notes is that of every lawyer, we suppose. The greatest difficulty he has is, not to determine what law may be when all the authorities are before him, but to *find* the authorities bearing upon a given subject readily. Judges are not expected to keep all the law in their heads, and the man who most frequently succeeds in a legal argument is the one whose industry has been the means of discovering the cases, and especially the latest, on the subject under consideration. In order to facilitate lawyers and students acquiring a better knowledge of their case, on whatever subject it may be, and a ready reference for them to the subject in hand, the writer has introduced here a variety of subjects and quoted the book or case or cases best suited in his opinion, for its elucidation. These subjects are chiefly the subject of Division Court jurisdiction. Many of them are not so. The latter were introduced for the purpose of affording assistance to practitioners as well as to students. Much time is lost to practitioners in searching books for the purpose of seeing what has been decided upon a subject they are considering. We think most lawyers will agree that much of their time can be saved by directing them to the best sources of information. In what follows we propose to do so in as short a form as possible.

Abandoning Excess.—Sinclair's D. C. Act, 1879, 81, 246, and the notes to Sections 69 and 70 of this Act; Sections 77, 78; Broom's Com. Law, 7th Ed., 71; 2 Mew's Digest, 1438. See page 21 hereof.

Absconding Debtor.—R. & J., 1-9; Sinclair on Absconding Debtors; Ont. Digest 1884, 1; Ont. Digest 1887, 1; 1 Mew's Digest, 1; L. R. Digest, 1880, 3; *Ex parte* Meyer. *In re* Stephany, L. R. 7 Ch., 188; *Ex parte* Gutierrez. *In re* Gutierrez, 11 Ch. D., 298; Broom on Com. Law, 6th Ed., 141; *Ex parte* M'George. *In re* Stevens, 20 Ch. D., 697; *Ex parte* Geisel. *In re* Stanger, 22 Ch. D., 436; McLean v. Bradley, 2 Sup. R. 535; Broom's Com. Law, 7th Ed., 144; R. S. O., 757-764, 596.

Account Stated.—Sinclair's D. C. Act, 1879, 64; 5 Mew's Digest, 534-544; 3 Mew's Digest, 1162, 1163; Add. on Con., 1048-1051; Busk v. Hurst, L. R., 1 C. P., 297; L. R. Digest 1880, 9; R. & J., 2288-2294, 4621.

Admission by a party may be sufficient evidence of debt: *Harris v. Chapman*, 17 L. T. N. S., 517; *Taylor on Ev.*, 8th Ed., 736, 696, 186, 702, 692, 149, 977, 1'96; *Sinclair's D. C. Law*, 1885, 285 "Account Stated" and pages there referred to; *Roscoe's N. P. Ev.*, title "Account Stated."

Accord and Satisfaction.—R. & J., 11, 12; *Broom's Com. Law*, 1017 and pages cited; *Ont. Digest*, 1884, 3; *Ont. Digest*, 1887, 4; 1 *Mew's Digest*, 7; *Add. on Con.*, 8th Ed., 1232-1237, 1211, 1212, 1214; *Read v. Great E. Ry. Co.*, L. R., 3 Q. B., 555; *Barclay v. Bank of N. S. Wales*, 5 App. Cas., 374; *Lee v. L. & Y. Ry. Co.*, L. R., 6 Ch. 527; *Goddard v. O'Brien*, 9 Q. B. D. 37; *Foakes v. Beer*, 11 Q. B. D., 221; 9 App. Cas. 605, S. C.; *Roscoe's N. P. Ev.*, title "Accord and Satisfaction"; *L. R. Digest*, 1880, 6; *L. R. Digest*, 1885, 3.

Action and Suit, Notice of.—R. & J., 20-46; *Ont. Digest*, 1884, 4; *Ont. Digest*, 1887, 4; 1 *Mew's Digest*, 30; *Sinclair's D. C. Act*, 1879, 230; *Arch. Pract.*, 12th Ed., 1301-1305; *Chitty's Forms*, 11th Ed., 45-50; *Leete v. Hart*, L. R., 3 C. P., 322; *Chamberlain v. King*, L. R., 6 C. P., 474; *Griffith v. Taylor*, 2 C. P. D., 194; *Pardee v. Glass*, 11 Ont. R., 275; *Downing v. Capel*, J. R., 2 C. P., 461; *Selmes v. Judge*, L. R., 6 Q. B., 724; *Poulaum v. Thirst*, L. R., 2 C. P., 449; *Jolliffe v. Wallesley L. Board*, L. R., 9 C. P., 62; *Smith v. W. Derby L. Board*, 3 C. P. D., 423; *Flower v. L. Board of Low Leytin*, 5 Ch. D., 347; *Foot v. Mayor of Margate*, 11 Q. B. D., 299, 788; *Bryson v. Russell*, 14 Q. B. D., 720; *Venning v. Steadman*, 9 Sup. R., 206; 19 Q. B. D., 352; L. R., 1880, 2581; 14 Q. B. D., 720; 11 Q. B. D., 299, 788. See Sec. 290.

Affidavit.—R. & J., 55-65; *L. R. Digest*, 1880, 61; *Ont. Digest*, 1884, 7; *L. R. Digest*, 1885, 19; 1 *Mew's Digest*, 83; *Broom's Com. Law*, 1019, and pages cited; *Sinclair's D. C. Act*, 1879, 358 and pages there referred to; *Sinclair's D. C. Law*, 1885, 42, 43; *Arch. Pract.*, 12th Ed., 1791, 1792, 1612-1627; *Chitty's Forms*, 11th Ed., 832, 833, and pages there referred to; *Taylor on Ev.*, 8th Ed., 1607, and pages there cited; 34 Ch. D. 172; Omission to serve copy of affidavit with Notice of Motion, W. N., 1887, 23; *Current Index*, L. R., 1887, 3; *Broom's Com. Law*, 59, 183, 184; *R. S. O.*, 720, 725.

Affirmation.—*Sinclair's D. C. Act*, 1879, 326; *Chitty's Forms*, 11th Ed., 699, 805; *R. S. O.*, title "Affirmation"; *L. R. Digest*, 1880, 63; *R. S. O.*, 712.

Agistment of Cattle.—See *Sinclair's D. C. Act*, 1879, 65; *Add. on Con.*, 8th Ed., 380, 417; *Smith v. Cook*, 1 Q. B. D., 79; *London and Yorkshire Bank v. Belton*, 15 Q. B. D., 457; 2 *Mew's Digest*, 1, 226; 23 U. C. R., 593.

Air, Free Use of.—R. & J., 65, 66; *Ont. Digest* 1887, 5; 1 *Mew's Digest*, 4; *Current Index* 1887, L. R., 69; *Carter v. Grassett*, 11 Ont. R., 331; 36 Ch. D., 87; *Pollock on Torts*, 336; 35 Ch. D., 317, 681; *Gale on Easements*; W. N. 1887, 219, 198; *Goddard on Easements*; *Washburn on Easements*; *Bryant v. Lefever*, 4 C. P. D., 172; *Jegon v. Vivian*, L. R., 6 Ch., 742; *Broom's Com. Law*, 819, 824.

Animals.—1 *Mew's Digest*, 88; *R. & J.*, 108, and pages there referred to; *Mason v. Morgan*, 24 U. C. R., 328; *Read v. Edwards*, 17 C. B. N. S., 245; *Ont. Digest* 1884, 8; *Ont. Digest* 1887, 10; *Broom's Com. Law*, 1021, and pages cited; *Pollock on Torts*, 149, 406; *Smith on Negligence*, 187, and pages there quoted; *L. R. Digest* 1880, 80; 35 Ch. D., 472; *L. R. Digest* 1885, 27;

W. N. 1887, 89; Cruelty to Animals, 18 Q. B. D., 532; Browne on the Interpretation of Words, 13-24; Broom's Com. Law, 800, 1021, and pages cited. Roscoe's N. P. Ev., title "Animals," "Negligence." See *post* "Dog"; R. S. O., title "Animals," and 1114.

Appeal.—R. & J., 109; Ont. Digest 1884, 10; Ont. Digest 1887, 9; Broom's Com. Law, 1021, and pages cited; 1 Mew's Digest, 127; L. R. Digest 1880, 83-89; L. R. Digest 1885, 28-31; Sections 148-153 hereto, and notes; Sinclair's D. C. Act, 1880, 113-115; Sinclair's D. C. Law, 1884, 250, 251; Sinclair's D. C. Law, 1885, 286; Cassell's Digest, 12, 13, 230-256.

As to amount in dispute: See *Levi v. Reed*, 6 Sup. R., 482; Current Index, L. R. 1887, 86, 87.

Apprentice.—R. & J., 112; 1 Mew's Digest, 197; Broom's Com. Law, 1022, and pages cited; Add. on Con., 8th Ed., 453-457; Smith on Master and Servant, 714, and pages quoted; Taylor on Ev., 8th Ed., 1613, and pages there mentioned; L. R. Digest 1885, 33, 34; L. R. Digest 1880, 101, 102; Broom's Com. Law, 1022, and pages cited; Roscoe's N. P. Ev., title "Apprentice"; R. S. O., 1304.

Arbitration and Award.—Sinclair's D. C. Act 1879, 65, and authorities there cited; also 360, 361; See 1 Mew's Digest, 220-419; Ont. Digest 1884, 12-20; Ont. Digest 1887, 12-15; Add. on Con., 388-415, 1140; L. R. Digest 1882, 102-125; L. R. Digest 1885, 34; R. & J., 114-185; Russell on Awards.

Award against principal debtor not binding on surety: De Colyar on Guarantees, 2nd Ed., 181, 182, 197, 273, 36 Albany L. J., 404; *Ex parte Young*. In *re* Kitchen, 17 Ch. D., 668; Victoria M. F. Ins. Co. *v.* Davidson, 3 Ont. R., 378; Welland *v.* Brown, 4 Ont. R., 217; Murray *v.* Gibson, 28 Grant, 21; The Carmarthen & Cardigan Ry. Co. *v.* Manchester & Milford Ry. Co., L. R., 8 C. P., 655, 691; Irwin *v.* Mariposa, 22 C. P., 371; Taylor on Ev., 8th Ed., 680, 681; Sinclair's D. C. Act, 1880, 44; Sinclair's D. C. Act, 1886, 45-48; Cassell's Digest, 13-20; Current Index 1887, L. R. 5; 18 Q. B. D., 244; W. N. 1887, 75, 204, 234; 18 Q. B. D., 7; Broom's Com. Law, 53, 115, 270; Roscoe's N. P. Ev., title "Award"; R. S. O., 673-684.

It has lately been held, in *Crampton v. Ridley*, W. N. 1887, 204, that an action for fees by an umpire and an arbitrator respectively lay against the parties to a commercial reference, upon the principle that there was an implied promise to pay such fees: See *Brockton v. Denison*, 20 L. J. N. S., 86; *Viney v. Bignold*, W. N. 1887, 234; *E. & W. India Dock Co. v. Kirk*, 12 App. Cas., 738; *In re Carus-Wilson and Greene*, 18 Q. B. D., 7.

Assault, Action for.—R. & J., 214; Ont. Digest 1884, 22; Ont. Digest 1887, 16, 676; L. R. Digest 1880, 139; 1 Mew's Digest, 466; L. R. Digest 1885, 41; Pollock on Torts, 380, and pages quoted; Smith on Master and Servant, 715, and pages quoted; Taylor on Ev., 8th Ed., 1614, and pages there referred to; Add. on Torts, title "Assault"; Broom's Com. Law, 1022, and pages cited; Roscoe's N. P. Ev., title "Assault."

Assignment of Debt.—R. & J., 264, 653; Kehoe on Choses in Action; Ont. Digest 1887, 24; L. R. Digest 1885, 42, 43; 1 Mew's Digest, 466; L. R. Digest 1880, 144-147; Add. on Con., 8th Ed., 1365, and pages there quoted.

Under our Statute an assignment of a debt by writing in any form of words vests not only the beneficial interest but the right to sue thereon in the name

of the assignee. In Equity, to the complete assignment of a chose in action it is not necessary that it should be in writing; *McMaster v. Canada Paper Co.*, 21 L. J. N. S., 16; see *Brice v. Bannister*, 3 Q. B. D., 569; *Ex parte Nichols*. *In re Jones*, 22 Ch. D., 782; *Mitchell v. Goodall*, 5 App. R., 164; *Garner v. Hayes*, 10 App. R., 24; *Gorringe v. Irwell India Rubber and Gutta Percha Works*, 34 Ch. D., 128; *Millar on Bills of Sale*, 4th Ed., 362; L. R. Digest 1880, 144-147; L. R. Digest 1885, 42, 43; *In re Clarke*, 35 Ch. D., 109; *In re Beetham*. *Ex parte Broderick*, 18 Q. B. D., 766; 34 Ch. D., 128; 2 White and Tudor's L. C. Equity, 1131-1137, and pages cited; *Agnew on Stat. of Frauds*, 522 and pages cited; R. S. O., 1190, 1171, 1275, 1009, 1227, 1197.

Attachment of Debts (Garnishment).—R. & J., 265-278; *Sinclair's D. C. Act*, 1879, 376, 377; *Ont. Digest*, 1884, 32; L. R. Digest, 1880, 148; 35 Ch. D., 449; *Ont. Digest*, 1887, 25; L. R. Digest, 1885, 43, 44; W. N., 1887, 201; 1 Mew's Digest, 470; 34 Ch. D., 172; 18 Q. B. D., 332; *Sinclair's D. C. Act*, 1880, 119 and pages there quoted; *Sinclair's D. C. Law*, 1884, 261-266 and pages there quoted; *Sinclair's D. C. Law*, 1885, 293, 294 and pages there mentioned; D. C. Act, 1886, 140, 141 and pages there quoted; *Drake on Attachment*, 1-745; *Badeley v. Consolidated Bank*, 34 Ch. D., 536. Garnishment taken against a debtor or garnishee residing out of the jurisdiction would probably be enjoined; *Chicago, &c., R. R. Co. v. Myer*, 11 West. Rep., 126; *Broom's Com. Law*, 1023, and pages cited; *Arch. Pract.*; *Lush's Pract.* on this subject; R. S. O., 579, 580, 1324.

Attorney and Solicitor.—R. & J., 293, 338; *Ont. Digest*, 1884, 38; *Ont. Digest*, 1887, 643; 1 Mew's Digest, 501; *Broom's Com. Law*, 1023; L. R. Digest, 1880, 4029-4072; L. R. Digest, 1885, 1523-1543; R. S. O., 43, 1338, 1343.

Articled Clerks, R. S. O., 1338.

Bailiff.—R. & J., 366; Sections 51-68 hereto, and notes; *Ont. Digest*, 1887, 203; 1 Mew's Digest, 546; *Sinclair's D. C. Act*, 1879, 362, 363 and pages cited; L. R. Digest, 1880, 157; L. R. Digest, 1885, 49; *Sinclair's D. C. Law*, 1884, 252 and pages cited; D. C. Law, 1885, 287 and pages cited; D. C. Act, 1886, 115-129, 132, 133 and pages cited; R. S. O., 545, 243, 592, 655, 559.

Bailment.—*Sinclair's D. C. Act*, 1879, 65; 1 Mew's Digest, 551-564; *Add. on Con.*, 8th Ed., 1367-1369 and the pages of that work there referred to; R. & J., 368, 369; *Ontario Digest*, 1884, 52; *Ontario Digest*, 1887, 30; *Danforth's (U. S.) Digest*, 77, 78; *Taylor on Ev.*, 8th Ed., 726, 727; *Pollock on Torts*, 295, 302; *Smith on Negligence*, 2nd Ed., 25, 121, 123, 163, 224; *Blackburn on Sale*, 2nd Ed., 390; *Black. Ed.*, and pages there referred to; *Dacey on Parties to Action*, 16, 352, 353, 361-366; *Benjamin on Sales*, 1st Ed., 45, 632, 633, 641-642; L. R. Digest, 1880, 157-161; L. R. Digest, 1885, 49, 50; *Broom's Com. Law*, 837-848, 979; 1 Mew's Digest, 546; *Story on Bailments*.

Bills of Exchange and Promissory Notes.—Reference is made to page 65 of *Sinclair's D. C. Act*, 1879, and the works there cited, and to the following: *Byles on Bills*, last Ed.; *Chalmers on Bills*; *Bigelow (U. S.) on Bills of Exchange*; *Edwards (U. S.) on Bills of Exchange*; *Parsons (U. S.) on Promissory Notes*; *Story (U. S.) on Promissory Notes*; 1 Mew's Digest, 1555-1822; L. R. Digest 1880, 417-450; L. R. Digest 1885, 205-239; R. & J., 475-564, 4311-4327; *Ont. Digest* 1884, 72-82; *Ont. Digest* 1887, 45-53; *Danforth's (U. S.) Digest*, 108-127; *Add. on Con.*, 1371, 1438, 1439, and the pages there referred to; *Clarke on Bills and Notes*; *Cassell's Digest*, 42-44; W. N.

1887, 44, 185 ; 34 Ch. D., 95 ; 36 Ch. D., 25 ; Broom's Com. Law, 1028, and pages cited ; R. S. O., 1195.

Bills of Lading.—R. & J., 568-573, 4327-4331 ; Ont. Digest 1884, 82 ; Smith's Mercantile Law ; Ont. Digest 1887, 53 ; Leggett on Bills of Lading ; 1 Mew's Digest, 1822 ; Add. on Con., 8th Ed., 1372, and pages cited, 510, 956-966 ; L. R. Digest 1880, 450, 3932-3952 ; L. R. Digest 1885, 239, 1475 ; Ont. Digest 1887, Appendix 6, 7 ; Current Index 1887, L. R., 115, 118 ; Deck Cargo, 12 App. Cas., 11 ; Broom's Com. Law, 1031, 1034, and pages cited ; R. S. O., 1189.

Bills of Sale and Chattel Mortgages.—R. & J., 573-596, 4332-4341 ; 1 Mew's Digest, 1822 ; Barron on Bills of Sale ; Ont. Digest 1884, 84 ; Millar on Bills of Sale ; Ont. Digest 1887, 57 ; L. R. Digest 1880, 450-460 ; L. R. Digest 1885, 239-260 ; Gunn v. Burgess, 5 Ont. R., 685 ; Current Index 1887, L. R., 12 ; Cassell's Digest, 56-62 ; May on Fraudulent Conveyances ; Hunt on Fraudulent Conveyances ; R. S. O., 1207.

Board and Lodging.—See Sinclair's D. C. Act, 1879, 65, and in addition to the works there referred to, reference is made to Add. on Con., 8th Ed., 293 ; 296, 1420 and pages there referred to ; 1 Mew's Digest, 1901 ; 4 Mew's Digest, 1681-1686 ; R. S. O., 580, 1284, 1324, 1420.

There is no exemption in garnishment proceedings in the Division Court of any sum due for wages where the debt sued for is for board or lodging, unless the money is actually necessary for the support and maintenance of the debtor's family : Sinclair's D. C. Law, 1884, 1, 2. The writer is of opinion that "board or lodging" extends to board or lodging for or on behalf of a debtor's wife and family as well as for himself, if he has become responsible therefor. See Ont. Digest, 1887, 64 ; Broom's Com. Law, 851 ; Sinclair's D. C. Law, 1884, 1-16 ; 11 Ont. R., 665 ; 7 App. R. 521 ; 1 Swanston, 64 ; 15 C. B., 524 ; Lyon & Redman on Bills of Sale, 46 ; 35 Alb. L. J., 416.

Boat-race.—When a referee's decision is not final, see *Sadler v. Smith*, L. R., 4 Q. B., 214. This was a horse-race, but the same principle will apply to a boat-race. A referee in such a case cannot exercise any power but what is given him, and if he does his decision will not be sustained. See also Broom's Com. Law, 7th Ed., 270.

Bonds.—See Sinclair's D. C. Act, 1879, 65 ; 1 Mew's Digest, 1901 ; 3 Mew's Digest, 92-181 ; R. & J., 598, 4342 ; Ont. Digest, 1884, 93 ; Ont. Digest, 1887, 64. Bond cannot be given by husband to wife : *Glass v. Burt*, 8 Ont. R., 391 ; Danforth's (U. S.) Digest, 129-134 ; L. R. Digest, 1880, 483-486 ; L. R. Digest, 1885, 262 ; Murfree (U. S.) on Bonds ; Add. on Con., 8th Ed., 1372, 1434 and pages there referred to ; Cassell's Digest, 44 ; Danforth's (U. S.) Digest, 129-134 ; Broom's Com. Law, 1031 and pages cited ; R. S. O. 707 ; Sec. 266 of this Act.

Calls for Stock.—Sinclair's D. C. Act, 1879, 65 ; L. R. Digest, 1880, 527, 528, 710-1023 ; L. R. Digest, 1885, 277, 322-391 ; 2 Mew's Digest, 491-513 ; R. & J., 752-784, 4380 ; Ont. Digest, 1884, 132, 136-151, 352 ; Ont. Digest, 1887, 104, 106-127 ; Daniel (U. S.) on Negotiable Instruments, &c. ; Dos Passos (U. S.) on Stocks ; Thompson (U. S.) on the Liability of Stockholders ; Buckley on Joint Stock Companies ; R. S. C., Chap. 129 ; R. S. O., 1438, 1454 ; R. S. C., 1580.

Calendar Month.—The meaning of this will be found in *Mignotti v. Colvill*, 4 C. P. D., 233; *Broom's Com. Law*, 509; *R. S. O. Interpretation Act*, S. 8, Sub-section 15.

Carriers.—*Sinclair's D. C. Act*, 1879, 65. See *R. & J.*, 634-638, 4346; *Ont. Digest* 1884, 101-104; *Ont. Digest* 1887, 71-73; *Add. on Con.*, 8th Ed., 1374, 1375, and pages there cited; 1 *Mew's Digest*, 1943-2114; *Pollock on Torts*, 434, 445; *Smith on Negligence*, 2nd Ed., 189, 190, and pages there cited; *Taylor on Ev.*, 8th Ed., 1630, and pages there referred to; *Campbell on Negligence*, 31-41; *Shearman & Redfield (U. S.) on Negligence*; *Beach (U. S.) on Negligence*; *Add. on Torts*; *Sutherland (U. S.) on Damages*; *Mayne on Damages*; *Cooley on Torts*; *L. R. Digest* 1880, 535-549; *L. R. Digest* 1885, 278, 279; *R. S. C.* 1211.

Upon the owner's proof of delivery to the carrier, and subsequent loss, the carrier must shew the act of God or the public enemy, and, on shewing this, the burden then shifts again to the owner, to shew, if he can, that the act in question might, by the exercise of reasonable care, have been foreseen and provided against: *Davis v. Wabash, St. L. & P. Ry. Co.*, 34 *Alb. L. J.*, 293.

As to the responsibility of carrying live stock: See *Kinnick v. Chicago, R. I. & P. Ry. Co.*, 34 *Alb. L. J.*, 449.

On the subject of Damages: See 18 *Q. B. D.*, 67, 373; *Browne on Carriers*; *Carver on Carriers*; *Goodeve on Carriers*; *Lawson on Carriers*; *Redfield on Carriers of Goods*; *Powell on Carriers*; *Rorer on Railways*; *Thompson (U. S.) on Carriers of Passengers*. Carrying dogs: 18 *Q. B. D.*, 176. Samples: 19 *Q. B. D.*, 30; 18 *Q. B. D.*, 121. Luggage: 19 *Q. B. D.*, 64. *Broom's Com. Law*, 1032, and pages cited.

Certiorari.—*Sinclair's D. C. Act*, 1879, 82-84; *R. & J.*, 639-647, 4346; *Ont. Digest* 1884, 104; *Ont. Digest* 1887, 73; 2 *Mew's Digest*, 2-38; *R. S. O.*, "Certiorari," *Broom's Com. Law*, 211-233; *L. R. Digest* 1880, 553-554; *L. R. Digest* 1885, 281; *Wood (U. S.) on The Legal Remedies of Certiorari, &c.*; *Danforth's (U. S.) Digest*, 165; *Paley on Convictions*, "Certiorari"; *Dickenson's Guide to the Quarter Sessions*; *Saunders' Pract. of Maj. Courts*, 172, 416; *Arch. Pract.*, 12th Ed., 1819, and pages cited; *Chitty's Forms*, 843, 844, and pages there mentioned; *Lush's Pract.*, 1020; *R. S. O.*, 507, 556, 780, 940.

Cheques.—See *Sinclair's D. C. Act*, 1879, 65, and the references mentioned in the next preceding paragraph thereto; *L. R. Digest*, 1880, 592, 593; *L. R. Digest*, 1885, 291; *R. & J.*, 652, 4303, 4343; *Ont. Digest*, 1884, 106; *Ont. Digest*, 1887, 75; 1 *Mew's Digest*, 1622-1646; *Add. on Con.*, 8th Ed., 1378, and pages there cited; *Chitty on Con.*; *Story on Bills of Exchange*.

The Statute of Limitations begins to run on an undated cheque when it is presented for payment, or when the funds which the drawer intended to obtain to meet it are not so obtained by him: *In re Bethell, Bethell & Bethell*, 34 *Ch. D.*, 561; *Byles on Bills*; *Chalmers on Bills*; *Daniel (U. S.) on Negotiable Instruments*, 1882; *Hutchinson on Banking*; *Morse (U. S.) on Banking*; *Collins on Banking*; *Danforth's (U. S.) Digest*, 94-103; *Taylor on Ev.*, 8th Ed., 46, 92, 729; *Banning on Limitations*; *Cheque undated*, 34 *Ch. D.*, 561; *Broom's Com. Law*, 1035 and pages cited.

Choses in Action.—*R. & J.*, 653-656, 4349-4352; *Kehoe on Choses in Action*; *Ont. Digest*, 1884, 106; see Statute on the subject, *R. S. O.*, Chap. 116; *Ont. Digest*, 1887, 76; 2 *Mew's Digest*, 88-103; 37 *Alb. L. J.*, 44; *L. R. Digest*, 1880, 595; 34 *Ch. D.*, 128; *L. R. Digest*, 1885, 292; *Williams on*

Personal Property, "Choses in Action;" Add. on Con., 8th Ed., 1378 and pages cited; Miller v. Race, 1 Smith's L. C., 742-747, Amer. paging; Broom's Com. Law, 1035 and pages cited; R. S. O., 462, 1190.

Collateral Security.—R. & J., 678-683; Danforth's (U. S.) Digest, 178; Ont. Digest, 1884, 110; Ont. Digest, 1887, 80; Colebrook (U. S.) on Collateral Security; Jones (U. S.) on Collateral Security. See notes *supra* under the head of "Cheques."

Collectors of Taxes.—R. & J., 682; Ont. Digest 1884, 25-27; Ont. Digest 1887, 21-24; R. S. O. 2090, 2152, 2083, 2155, 73-94.

As to when taxes are due under our Assessment Act: See Chamberlain v. Turner, 31 C. P., 460; Devanney v. Dorr, 4 Ont. R., 206; Cassell's Digest, 20-30; Danforth's (U. S.) Digest, 1083-1102; Cooley on Taxation; Harrison's Municipal Manual; 6 Mew's Digest, 600-630; Assessment Act of Ontario; Dillon on Mun. Cor.

Conspiracy Affecting Civil Rights.—To warrant a civil remedy in case of conspiracy, it must be made to appear that the plaintiff will sustain irreparable damage unless the Court grants relief: Mogul Steamship Co. v. McGregor, 15 Q. B. D., 476. See also R. v. Manning, 12 Q. B. D., 241; State v. Glidden, 35 Alb. L. J., 348; 2 Mew's Digest, 822; 10 Sup. R., 652; Broom's Com. Law, 1039, and cases cited; Wright on Conspiracy.

Constable.—R. & J., 695-697; Ont. Digest 1887, 83; 2 Mew's Digest, 823; Section 52 and notes; R. S. O., 792, 825, 849, 2027, 2192, 1892, 220, 243, 833.

A refusal to aid a Constable in the execution of his duty is an indictable offence, and probably it would be to refuse to aid a Division Court Bailiff acting as such under Section 52 of this Act: R. v. Sherlock, L. R., 1 C. C., 20.

As to resisting apprehension by Constable: See R. v. Sanders, L. R., 1 C. C., 75.

When a warrant has been issued to apprehend a person for an offence less than felony, the Constable who executes it must have the warrant in his possession at the time of arrest: Codd v. Cabe, 1 Ex. D., 352; R. v. Marsden, L. R., 1 C. C., 131.

Unless warrant is duly "backed," officers are not justified in arresting: R. v. Cumpton, 5 Q. B. D., 341; Bryson v. Russell, 14 Q. B. D., 720. See the notes to Section 52; 37 Alb. L. J., 17; Broom's Com. Law, 1039, and pages cited.

Constitutional Law.—R. & J., 698-704, 4360-4364; Ont. Digest 1884, 114; Ont. Digest 1887, 84, 350, and the Appendix thereto; Cartwright's Cases on the B. N. A. Act, 1-39; Broom on Constitutional Law; Cooley on Constitutional Limitations; Story on the Constitution of the U. S.; Danforth's (U. S.) Digest, 208-231; Bourinot on Parliamentary Institutions; Doute on the Constitution of Canada; O'Sullivan on the Government of Canada; Todd on Parliamentary Government in England; Travis on Constitutional Powers of Parliament.

Confusion of Property.—Ont. Digest 1884, 114; Moffat v. G. T. Ry. Co., 15 C. P., 392; Lawrie v. Rathbun, 28 U. C. R., 255; Gilmore v. Buck, 24 C. P., 187; G. W. Ry. Co. v. Hodgson, 44 U. C. R., 187; Drake on Attachment, 5th Ed., Section 199; Danforth's (U. S.) Digest, 205.

Contract.—R. & J., 705-743; L. R. Digest, 1880, 1059-1081; L. R. Digest, 1885, 407; R. S. O., 462.

When apportionable, see 33 Alb., L. J., 348; Ont. Digest, 1884, 124; Ont. Digest, 1887, 88; Add. on Con.; 2 Mew's Digest, 842-884; Contract by Telegram, 34 Alb., L. J., 259, 297; Cassell's Digest, 67-85; Blackburn on Contract of Sale; Anson on Con.; Pollock on Con.; Chitty on Con.; Smith on Con.; Leake on Con.; Wharton (U. S.) on Con., W. N., 1887, 45; Broom's Com. Law, 1039, 1060, 1061, and pages cited; Danforth's (U. S.) Digest, 234-252; 34 Ch. D., 582; 19 Q. B. D., 341; Current Index, L. R., 1887, 45, 46.

Contract (Building).—33 Alb., L. J., 371; Ont. Digest, 1884, 820; Ont. Digest, 1887, 68, 70; 2 Mew's Digest, 841; 36 Ch. D., 243; Current Index, L. R., 1887, 15; see the next preceding note; 18 Q. B. D., 590; Broom's Com. Law, 1039, 1060, 1061 and pages cited; R. S. O., 1217.

Contribution.—R. & J., 746; L. R. Digest, 1880, 1081, 1082, 3360-3381; Ont. Digest, 1884, 131; L. R. Digest, 1885, 413, 1261-1265; Ont. Digest, 1887, 330; Snell's Equity; Adams' Equity; 2 Mew's Digest, 1041; Broom's Com. Law, 312; Chitty on Con.; see the notes on "Contract," ante, page 88; Add. on Con.; Broom's Com. Law, 313; Story's Eq. Jur., title "Contribution."

Contributory Negligence.—Addison on Torts; Saunders on Negligence; 12 App. Cas., 41; Pollock on Torts, 361, 374-378; W. N., 1887, 223, 380, 391, 484, 394, 395 and cases there cited; 2 Mew's Digest, 687; Roscoe's N. P. Ev., 13th Ed., 1438; Broom's Com. Law, 789; Taylor on Ev., 8th Ed., 1727 and cases cited; Smith on Negligence; Danforth's (U. S.) Digest, 755-758. See "Negligence" post.

Corporations.—R. & J., 752-784, 4377-4392; Ont. Digest, 1884, 132; Ont. Digest, 1887, 103; 2 Mew's Digest, 298, 1166; Broom's Com. Law, 1037, 1042 and pages cited; Cassell's Digest, 85-104; Current Index, L. R. 47; Grant on Corporations; Abbott's (U. S.) Digest; Harrison's Municipal Manual; Angell and Ames (U. S.) on Corporations; Brice on *Ultra Vires*; Dillon (U. S.) on Municipal Corporations; Morawetz (U. S.) on Corporations; American Corporation Cases from the year 1872-1884; R. S. O., title "Companies and Corporations."

Costs, General and in Appeal, &c.—2 Mew's Digest, 1301; R. & J., 785-836, 4393-4400; Section 46 hereto, and notes to that Section; Ont. Digest 1884, 151-163; Ont. Digest 1887, 129-143; Gray on Costs; Current Index 1887, L. R., 87, 47; Broom's Com. Law, 1042, and pages cited.

County and Division Courts.—R. & J., 838-855; Ont. Digest 1884, 166; Ont. Digest 1887, 144; W. N. 1887, 214; 19 Q. B. D., 522; Current Index 1887, L. R., 48; Broom's Com. Law, 1043, and pages cited; R. S. O., 540; 2 Mew's Digest, 1409, title "County Courts."

County Crown Attorney.—R. S. O., Chapter 79; *In re Fenton*, County Crown Attorney of the County of York, and The Board of Audit of the County of York, 31 C. P., 31; *In re Stanton* and The Board of Audit of the County of Elgin, 3 Ont. R., 86. See *Van Norman v. Grant*, 27 C. B., 498. Under Section 7 of the above Act, see *Cundell v. Dawson*, 4 C. B., 376. Saunders' Pract. of Magistrates' Courts, 5th Ed., 702, and pages cited.

Counter-claim.—Ont. Digest 1884, 607; Sinclair's D. C. Law, 1884 and 1885, under "Counter-claim"; Ont. Digest, 1887, 537; 2 Mew's Digest, 1407; Broom's Com. Law, 1042, and pages cited; Waterman (U. S.) on Set-off, Recoument and Counter-claim, 2nd Ed.; 5 Mew's Digest, 1233-1247; Sinclair's D. C. Law, 1884, 256-258, and pages cited; D. C. Law, 1885, 290, and pages cited; D. C. Act, 1886, 41; MacLennan's Jud. Act, "Counter-claim"; L. R. Digest, 1880, 1131; L. R. Digest, 1885, 439; B. & L., last Ed., title, "Pleading," "Counter-claim"; Section 73 hereof.

Courts.—R. & J., 861-863, 4403; Ont. Digest, 1884, 172-181, 214; Ont. Digest, 1887, 148, 153; 2 Mew's Digest, 1409; Broom's Com. Law, 1044 and pages cited; Add. on Con., 8th Ed., 1240.

Covenant.—R. & J., 863-880, 4404; Ont. Digest, 1884, 181; Ont. Digest, 1887, 154; 2 Mew's Digest, 1512; Blackburn on Sale, 2nd Ed., title "Covenants"; Current Index, 1887, L. R., 49; Broom's Com. Law, 1044, and pages cited; Add. on Con., 8th Ed., 1386, and pages cited, title "Covenant" and "Covenants running with the Land"; Chitty on Con.; Anson on Con.; Leake on Con.; Pollock on Con.; Parsons (U. S.) on Con.; Smith on Con.; Wharton on Con.; R. S. O., 452, 609.

Criminal Conversation.—R. & J., 900; Broom's Com. Law, 885. See page 77 of this work; R. S. O., 469, 554, 884.

Crops.—R. & J., 952; Ont. Digest, 1884, 192; Ont. Digest, 1887, 168; 3 Mew's Digest, 1; Taylor on Ev., 8th Ed., 1656 and pages cited; Broom's Com. Law, 1048 and pages cited; Blackburn on Sale, 2nd Ed., title "Crops"; Roscoe's N. P. Ev., title "Crops"; Chitty on Con.; Agnew on Stat. of Frauds, 529 and cases cited; R. S. O., 1322; Add. on Con.

Custom.—Section 69 and notes thereto, *ante*, page 74; The Grand Hotel Co. v. Cross, 44 U. C. R., 153; Add. on Torts; R. & J., 980 and next note hereto; Roscoe's N. P. Ev., title "Custom."

Custom and Usage.—R. & J., 980; Ont. Digest, 1884, 196; Ont. Digest, 1887, 173; Add. on Torts; 3 Mew's Digest, 11; Current Index, 1887, L. R. 51; Broom's Com. Law, 1049 and pages cited; see notes to Section 69, same title; Add. on Con., 1387 and pages cited; Taylor on Ev., 8th Ed., 1657 and pages cited; Blackburn on Sale, 2nd Ed., 41, 80, 102, 109; Smith's Master and Servant, 4th Ed., 54; De Colyar on Guarantees, 345, title "Custom"; Roscoe's N. P. Ev., title "Usage"; 36 Alb., L. J., 16.

Damages.—R. & J., 983, 998; Ont. Digest, 1884, 196; Ont. Digest, 1887, 174; Mayne on Damages, 3rd Ed.; Danforth's (U. S.) Digest, 303-307; 3 Mew's Digest, 29; Current Index, 1887, L. R., 51; Cassell's Digest, 113-129; Sutherland (U. S.) on Damages; Broom's Com. Law, 1049, 1051, and pages cited; Taylor on Ev., 8th Ed., 1657, 1658, and pages cited; Smith on Negligence, 192, 193, and pages cited; Sedgwick (U. S.) on Damages, Arch. Pract., 12th Ed., 1832, and pages cited; Add. on Torts; Add. on Con.; Powell on Evidence; Blackburn on Sale, 2nd Ed., 508-522, 121, 400; 36 Ch. D. 113; Hamilton v. Vicksburg, (U. S.) 119 U. S., 280; R. S. O., 707.

Death of Party.—R. & J., 999; Ont. Digest, 1884, 198; Ont. Digest, 1887, 176; 3 Mew's Digest, 70; Current Index, 1887, L. R., 52; 18 Q. B. D., 771;

Broom's Com. Law, 1051, and pages cited; Add. on Con., 8th Ed., 1388, and pages cited; Arch. Pract., title "Death"; Lush's Pract., 1133, and pages cited; Roscoe's N. P. Ev., 13th Ed., 1332, and pages cited.

Debt.—R. & J., 1004-1005; 3 Mew's Digest, 89; Broom's Com. Law, 234, 265, 581; L. R. Digest, 1880, 1359-1362; L. R. Digest, 1885, 488, 489; Maxwell on Statutes, 1st Ed., 44, 51; May on Fraudulent Conveyances, 530, and pages cited; Smith's Leading Cases, title "Debt"; Roscoe's N. P. Ev., 13th Ed., 1332, and pages cited; Agnew on Stat. of Frauds, 85, 95; R. S. O., 506, 1190, 1195.

Deed.—R. & J., 1008-1047; Ont. Digest, 1884, 200; Ont. Digest, 1887, 177; 3 Mew's Digest, 92; Cassell's Digest, 130-132; Broom's Com. Law, 1052, and pages cited; Chitty on Con.; Add. on Con., 8th Ed., 1389, and pages cited; May on Fraudulent Conveyances, 530, and pages cited; Roscoe's N. P. Ev., 13th Ed., 1335, and pages cited, title "Deed"; Agnew on Stat. of Frauds, 530, and pages cited; R. S. O., 904, 1040, 1091, 876.

Defamation.—R. & J., 1018-1071; Ont. Digest, 1884, 204; Ont. Digest, 1887, 183; 3 Mew's Digest, 124; Add. on Torts; Broom's Com. Law, 1079, 1113, and pages cited; Roscoe's N. P. Ev., 13th Ed., 1337-1340, and pages cited; Odgers on Libel and Slander; L. R. Digest, 1880, 1371-1389; L. R. Digest, 1885, 497-500; see ante, p. 76; Taylor on Ev., 8th Ed., 1709, 1710, and pages cited; R. S. C., 1897; R. S. O., 469, 506, 554, 698, 776.

Detinue.—R. & J., 1075-1077; Ont. Digest, 1887, 99; 3 Mew's Digest, 329; Lush's Pract., 619, 823; Broom's Com. Law, 234; Roscoe's N. P. Ev., 13th Ed., title "Detention of Goods"; Virginia Coupon Cas., 114 U. S., 270; L. R. Digest 1880, 1406; L. R. Digest, 1885, 505; Chitty's Forms, 11th Ed., 851, and cases cited.

Discovery and Inspection.—3 Mew's Digest, 335; R. & J., 1078, 1792; Ont. Digest, 1884, 209, 351, 248, 249; Ont. Digest, 1887, 193, 226-232; Broom's Com. Law, 1054, and pages cited; L. R. Digest, 1880, 1412, 1413; L. R. Digest 1885, 507, 508; Lush's Pract., 245-249; Arch. Pract., "Discovery"; Sichel & Chance on Discovery; Kerr on the same subject; Petheram on Interrogatories; Hare on Discovery; MacLennan's Jud. Act; R. S. O., 493, Rules of Court; Sinclair's D. C. Law, 1885, 292, and pages cited.

Distress.—R. & J., 1080-1093; Ont. Digest, 1884, 209; Ont. Digest, 1887, 194; 3 Mew's Digest, 457; Lush's Pract., 851, and pages cited; Cassell's Digest, 133, 134; Broom's Com. Law, 1055, and pages cited; Woodfall's L. & T.; Add. on Torts; Pollock on Torts; Add. on Con., 8th Ed., 1392, 1393, and pages cited; Oldham & Foster on Distress; Taylor on Ev., 8th Ed., 1666, and cases cited; Roscoe's N. P. Ev., 13th Ed., 1346, and pages cited, title "Distress"; R. S. O., titles "Distress," "Landlord and Tenant," and 691, 921, 1001, 1024, 728, 729, 731, 1319, 2086.

Division Court.—R. & J., 1098-1117; Ont. Digest, 1884, 214; Ont. Digest, 1887, 197-203; Broom's Com. Law, 7th Ed., 67, 1043 and pages cited under the title "County Court"; R. S. O., 540; 2 Mew's Digest, 1409.

Dogs.—R. & J., 1117; R. S. O., Chap. 194; 1 Mew's Digest, 88-109; see note to "Animals" at page 82 hereto; Broom's Com. Law, 1055 and pages cited; Add. on Torts, title "Dogs"; L. R. Digest, 1880, 1431, 2447; Spring Co. v. Edgar, 99 U. S., 645; R. S. O., 1914, 2335, 2375, 732.

As to animals *feræ naturæ*: Roscoe's N. P. Ev., title "Dog;" Pollock on Torts; Taylor on Ev., 8th Ed., 147, 352; Smith on Negligence, 54, 56, 138; Campbell on Negligence, 25, 26; Saunders on Negligence; Sinclair's D. C. Law, 1885, 265, 266.

Domicile.—R. & J., 1118, 1540-1547; Ont. Digest, 1884, 221; Ont. Digest, 1887, 203; 3 Mew's Digest, 502, 970-991; Danforth's (U.S.) Digest, 339, 340; L. R. Digest, 1880, 1431-1437; L. R. Digest, 1885, 514-516; Taylor on Ev., 8th Ed., 227-229, 519, 520.

Drainage.—R. S. O., 386-388, 2360-2370, 1904, 1915, 2935; R. & J., 3965-3968; Ont. Digest, 1884, 228; Ont. Digest, 1887, 208.

Drunkness.—R. & J., 1154; see notes to Section 69 under this head; Broom's Com. Law, 1074, and cases cited; Blackburn on Sale, 2d Ed., 26; Tatum v. State of Alabama, 63 Ala., 47; Wheeler v. Wheeler, 53 Iowa, 511; Mahone v. Mahone, 19 Cal., 627; Brockaway v. The Mutual Benefit Life Ins. Co., 9 Fed. Rep., 249; Young v. The Union Mutual Life Ins. Co., 36 Ohio, 596; Hutton v. The Waterloo Life Ins. Co., 1 F. & F., 735; Mowry v. The Home Life Ins. Co., 9 R. I., 346; Mutual Benefit Life Ins. Co. v. Holterhoff, 2 Cincinnati, 379; Van Valkenburgh v. The Am. Pop. Life Ins. Co., 70 N. Y., 605; Knickerbocker Life Ins. Co. v. Foley, U. S. Sup. Ct., 1881, cited in Browne on the Interpretation of Common Words, 203; Browne on the Interpretation of Common Words, 197-203, 205-207; 3 Mew's Digest, 507; Smith's Master and Servant, 144, 147; L. R. Digest, 1880, 1442; Add. on Con.; Chitty on Con.; Anson on Con.; Leake on Con.; Parsons (U. S.) on Con.; Pollock on Con. See *ante* pages 68-71; R. S. O., 2205, 2610.

Entries in Books, Evidence.—34 Ch. D., 88; Sections 38, 45, 46, and next paragraph; Roscoe's N. P. Ev., 13th Ed., title "Books"; Taylor on Ev., 8th Ed., same title; Arnott v. Hayes, 36 Ch. D., 731; 35 Alb. L. J., 66, 175, 94, 303.

Equitable Assignment.—White & Tudor's L. O. Equity, Vol. 2, 771-823; Kehoe on Choses in Action; R. & J., 655, 4949; 11 App. R., 186; 12 App. R., 190; 2 Mew's Digest, 88-100; May on Fraudulent Conveyances, 532, and pages cited; Danforth's (U. S.) Digest, 58-63; L. R. Digest, 1880, 1522, 1523; L. R. Digest, 1885, 41-43; Ont. Digest, 1884, 106; Ont. Digest, 1887, 76.

Escape, Actions for.—R. S. O., 707, 772; R. & J., 1226.

Estoppel.—R. & J., 1154, 1248-1281; Ont. Digest, 1884, 236; Ont. Digest, 1887, 214; 3 Mew's Digest, 1073; L. R. Digest, 1880, 1526-1543; L. R. Digest 1885, 535-541; Danforth's (U. S.) Digest, 407-412; Roscoe's N. B. Ev., title "Estoppel"; Broom's Com. Law, 1059, and pages cited; The T. & L. Co. v. Rutlan, 1 Sup. R., 564; Cassell's Digest, 159, 160; Taylor on Ev., 8th Ed., 1672, and pages cited; Add. on Torts, title "Estoppel"; Byles on Bills, title "Estoppel"; Smith's L. C., title "Estoppel"; Blackburn on Sale, 190-196; Add. on Con., 8th Ed., 33, 206, 207, 212; Stephen on Ev.; Herman (U. S.) on Estoppel; Wells on Res Adjudicata; 36 Ch. D., 36, 740; Current Index 1887, L. R., 57.

Estreats.—R. S. O., 861-865.

Evidence.—R. & J., 1288-1409; Ont. Digest, 1884, 240; Ont. Digest, 1887,

220; Taylor on Ev., 8th Ed.; 3 Mew's Digest, 1151; 34 Ch. D., 88; Sections 38, 45, 46, hereto; Cassell's Digest, 160-164; Broom's Com. Law, 1060, and pages cited; Best on Ev.; Burrill (U. S.) on Circumstantial Ev.; Greenleaf (U. S.) on Ev.; Rogers' Expert Testimony; Roscoe's N. P. Ev.; Powell on Ev.; *In re Rhodes*. *Rhodes v. Rhodes*, 36 Ch. D., 586; R. S. O., 710, 814, 858, 1885, 571, 2199, 776.

Reading book to jury: 33 Alb. L. J., 323.

Execution.—R. & J., 1414-1466; Ont. Digest, 1884, 263; Ont. Digest, 1887, 249; 3 Mew's Digest, 1520; Current Index, 1887, L. R., 58; 18 Q. B. D., 451; Broom's Com. Law, 1061 and pages cited; Arch. Pract., title "*Fieri Facias*"; Lush's Pract., title "*Execution*"; Maclellan Jud. Act, title "*Execution*"; R. S. O., 731, 244, 1103, 1210, 1886.

Execution Creditors.—R. S. O., 798, 1252, 1227.

Executors, Etc.—R. & J., 1466-1506; Ont. Digest, 1884, 266; Ont. Digest, 1887, 252; 3 Mew's Digest, 1665; Cassell's Digest, 164-173; Current Index, 1887, L. R., 58; Broom's Com. Law, 1061 and pages cited; The Surrogate Courts Act, Ontario; Williams on Executors; Roscoe's N. P. Ev., title "*Executor*"; Howell's Sur. Ct. Prac.; Coote's Probate Prac.; R. S. O., titles "*Executors*," "*Trustees and Executors*."

Exemption from Seizure and Distress.—R. S. O., 731 *et seq.*, 902, 1319 *et seq.*, 2086, 2090. From Taxation, 2088.

Experts.—Broom's Com. Law, 923, 924; Rogers on Expert Testimony; Roscoe's N. P. Ev., title "*Experts*"; Danforth's (U. S.) Digest, 421; 33 Alb., L. J., 243, 457; 34 Alb., L. J., 334, 517, 515, 238, 57; 35 Alb., L. J., 175, 372; 36 Alb., L. J., 14, 435; Taylor on Ev., 8th Ed., 1676 and pages cited; L. R., 1 Ch., 349; 16 L. J. N. S., 161; 10 App. Cas., 200; L. R. 17, Eq., 373; Agnew on Stat. of Frauds, 395; 2 Amer. Crim. Law Magazine, 130-170; 45 U. C. R., 428; R. S. O., 724.

Express Company.—R. & J., 1507; Ont. Digest, 1887, 265; Browne on Carriers; Lawson on Contracts of Carriers; Hutchinson (U. S.) on Carriers. See Section 101, sub-section (2) (c).

Extras.—R. & J., 1514; Ont. Digest, 1884, 820; Add. on Con., 8th Ed., 401, 471; see "*Contract*" (Building) *ante* page 88; Roscoe's N. P. Ev., title "*Extras*"; 2 Mew's Digest, 841-1036; Taylor on Ev., 8th Ed., 374, 375; Chitty and other works on Contracts.

Factories Act.—R. S. O., 2304, 2318.

False Imprisonment.—R. & J., 1515, and subjects there cited; Broom's Com. Law, 1062, and pages cited; Roscoe's N. P. Ev., title "*False Imprisonment*"; see *ante* page 76; Pollock on Torts, 188, 191; Add. on Torts; Ont. Digest, 1884, 279; Ont. Digest, 1887, 266; R. S. O., 469.

False Pretences.—Broom's Com. Law, 1063 and pages cited; R. & J., 913-920; 2 Mew's Digest, 1760-1797; Roscoe's N. P. Ev., title "*False Pretences*"; Taylor on Ev., 8th Ed., 1677 and pages cited; Smith's Master and Servant,

309, 395; R. S. C., 1920; Roscoe's Crim. Ev., title "False Pretences; Arch. Crim. Pleading, title "False Pretences."

Fences.—R. & J., 1517-1520; Ont. Digest, 1884, 279; Ont. Digest, 1887, 267; 3 Mew's Digest, 1768; Broom's Com. Law, 800; Smith on Negligence, 18; R. S. O., 1914, 1916, 2233, 2234, 2353, 1653; 8 Q. B. D., 274; L. R. Digest, 1880, 1652; Pollock on Torts; Addison on Torts; Harrison's Mun. Manual, 1057, 1058, and pages cited; 46 U. C. R., 87; 6 App. R., 181.

Fire.—R. & J., 1520-1525; Ont. Digest, 1884, 280; Ont. Digest, 1887, 267; 3 Mew's Digest, 1781; 51 Vict., Ontario; L. R. Digest, 1880, 1655; Addison on Torts; Pollock on Torts; R. S. O., 2350, and title "Fire."

Fixtures.—R. & J., 1527; Ont. Digest, 1884, 281; Ont. Digest, 1887, 269; 3 Mew's Digest, 1808; 1 Am. Law Review, N. S., 229; Broom's Com. Law, 398-395; Woodfall's L. & T.; Brown on Fixtures; Ames & Ferard on Fixtures; Taylor on Ev., 8th Ed., 889, 892-895, 288; Add. on Con.; Pollock on Con.; Anson, Leake and Chitty, on Contracts; Agnew on Stat. of Frauds, 155; L. R. Digest, 1880, 1668-1670; L. R. Digest, 1885, 594.

Forbearance to Sue.—Sinclair's D. C. Act, 1879, 65, 66; Add. on Con., 8th Ed., 11; R. & J., 713, 4370; 2 Mew's Digest, 917 *et seq.*; L. R. Digest, 1880, 1062-1064; L. R. Digest, 1885, 412, 413; Ont. Digest, 1884, 127; Ont. Digest, 1887, 91; Crears v. Hunter, 19 Q. B. D., 341; Broom's Com. Law, 7th Ed., 389; Anson, Chitty, Pollock, Addison, and other works on Contracts; Agnew on Stat. of Frauds, 69-71.

Foreign Law and Foreigner.—R. & S., 1540-1544; Ont. Digest, 1884, 284; Ont. Digest, 1887, 271; 3 Mew's Digest, 1833; Current Index, 1887, L. R., 59; Broom's Com. Law, 56, 1020, and pages cited; Pigott on Foreign Judgments; 36 Ch. D., 269, 600; L. R. Digest, 1880, 1672-1691; L. R. Digest, 1885, 595-598; Battel's Law of Nations; Story's Conflict of Laws; Agnew on Stat. of Frauds, 65; R. S. O., 715, 723, 726, 1052.

Fraud and Misrepresentation.—R. & J., 1551-1561; Ont. Digest, 1884, 286; Ont. Digest, 1887, 272; 3 Mew's Digest, 1839.

Fraud is defined to be "Wherever any one has by fraudulent misrepresentation induced another to part with his rights on the belief that such representation was true": Broom's Com. Law, 6th Ed., 340; 50 L. T. N. S., 656; Broom's Com. Law, 7th Ed., 1065, and pages cited; Add. on Con.; Pollock on Torts, 242-254; Add. on Torts; Roscoe's N. P. Ev., titles "Deceit," "Fraud," "Misrepresentation"; W. N. 1887, 207; L. R. Digest, 1880, 1711, 1647-1650, 2449; Emden's Digests; Danforth's (U. S.) Digest, 464, 465; Benjamin on Sales, title "Fraud."

Fraudulent Conveyance or Preference.—R. & J., 1583, 1609; Ont. Digest, 1884, 292; Ont. Digest, 1887, 282; May on Fraudulent Conveyances; Taylor on Ev., 8th Ed., 106, 107; 3 Mew's Digest, 1882-1899; L. R. Digest, 1880, 1703-1711; Cassell's Digest, 176-179, 186-195; L. R. Digest, 1885, 601-603; 14 Q. B. D., 295; W. N. 1887, 21; 34 Ch. D., 147; Broom's Com. Law, 7th Ed., 362, 592; Bump on Fraudulent Conveyances; Hunt on Fraudulent Conveyances; Story's Equity Jur., title "Fraudulent Conveyances"; Adams' Equity, *Idem*; Burrill (U. S.) on Assignments; Emden's Digests; Danforth's (U. S.) Digest, 503-508; Anson on Contracts; R. S. O., 899.

Fraudulent Judgment.—R. & J., 1612, 4505; Ont. Digest, 1884, 306; Ont. Digest, 1887, 295; Cassell's Digest, 225-229; see *ante*, page 3, and authorities there cited; L. R. Digest, 1880, 2013-2021; Broom's Com. Law, 7th Ed., 270, 335; Emden's Digests; *The Commercial Bank v. Wilson*, 3 E. & A., 257.

Fraudulent Removal of Goods.—R. & J., 1424; 3 Mew's Digest, 480-485; Woodfall on Landlord and Tenant, Chapter X., Section 4 (d); R. v. Creese, L. R., 2 C. C., 105; R. v. Lockie, 7 Ont. R., 431; Emden's Digests.

Game Law.—R. S. O., 2373-2377.

Gaming (Gambling).—R. & J., 1620, 4506; Ont. Digest, 1884, 309; Ont. Digest, 1887, 296; 3 Mew's Digest, 1945; Emden's Digests; see notes to Section 69, *ante*, page 63 *et seq.*; L. R. Digest, 1880, 1727-1731; 13 Q. B. D., 779, 377, 505; 12 Q. B. D., 126; 11 Q. B. D., 44, 100; Browne (U. S.) on the Interpretation of Words, 141-150; R. S. O., 2190, 2254.

Gift.—R. & J., 1626, 4506; Ont. Digest, 1884, 310; Ont. Digest, 1887, 297, 298; Broom's Com. Law, 7th Ed., 435, 896; Cassell's Digest, 136, 137; 27 Ch. D., 631; L. R. Digest, 1880, 1737-1741; L. R. Digest, 1885, 612, 613; 3 Mew's Digest, 1987-1995; Danforth's Digest (U. S.), 511; Roscoe's N. P. Ev., 932, 933; *In re Ridgway. Ex parte Ridgway*, 15 Q. B. D., 447; *In re Player. Ex parte Harvey*, 15 Q. B. D., 682; 34 Ch. D., 716; 33 Ch. D., 213; W. N., 1857, 83, 252; Williams on Per. Property; Mayne on Fraudulent Conveyances; Byles on Bills; Story's Eq. Jur.; Add. on Torts; Adam's Lq.; Chitty on Con.; Taylor on Ev., 172, 173, 177, 837, title in all "Gift"; Pollock on Torts; Emden's Digests.

Goodwill.—R. & J., 1627, 719; Ont. Dig., 1884, 311; 3 Mew's Dig., 1996, 2001; Add. on Con., 8th Ed., 1122; 27 Ch. D., 145; 25 Ch. D., 472; *Vernon v. Hallam*, 34 Ch. D., 748; 32 Ch. D., 213; Adam's Eq., 4th Amer. Ed., 81, 246; L. R. Digest, 1880, 1742-1744; L. R. Digest, 1885, 613, 614; Emden's Digests; Chitty on Con.; Story's Eq. Jur.; Smith's Mer. Law.

Goods Sold and Delivered.—In addition to the citations at page 63 of Sinclair's D. C. Act, 1879, we cite the following: Add. on Con., 8th Ed., 1401, 1446-1448 and pages there cited; L. R. Digest, 1880, 3662-3701; 6 Mew's Digest, 766-999; R. & J., 4703; Ont. Digest, 1884, 711-715; Ont. Digest, 1887, 607-617; L. R. Digest, 1885, 1362-1368; Roscoe's N. P. Ev.; Taylor on Ev., 8th Ed.; Bullen & Leake's Pleading; Chitty on Con.; Pollock on Con.; Leake on Con.; Emden's Digests.

Goods Bargained and Sold.—See the authorities and works cited at pages 63 and 64 of Sinclair's D. C. Act, 1879, and the following: Add. on Con., 8th Ed., 1401, 1446-1448 and pages there cited; L. R. Digest, 1880, 1742, 3662-3701; 6 Mew's Digest, 766-999; R. & J., 4703; Ont. Digest, 1884, 711-715; Ont. Digest, 1887, 607, 617; L. R. Digest, 1885, 1362-1368, 1742; Chitty on Con.; Roscoe's N. P. Ev.; Bullen & Leake's Pleading; Pollock on Con.; Leake on Con.; Mayne on Damages; Emden's Digests.

Guarantee and Indemnity.—Sinclair's D. C. Act, 1879, 66. In addition to the citations there given, see 6 Mew's Digest, 101-250; R. & J., 1628, 4678-4683; Ont. Digest, 1884, 651, 657; Ont. Digest, 1887, 298, 563-567; 3 Mew's Digest, 2010; Broom's Com. Law, 1067 and pages cited; De Colyar on Guarantees; Baylies (U. S.) on Sureties and Guarantors; R. S. O., 1196.

Habeas Corpus.—R. S. O., 775, 780; 3 Mew's Digest, 2011-2025; L. R. Digest 1880, 1751; L. R. Digest, 1885, 617; Hurd (U. S.) on Habeas Corpus; Forsyth (U. S.) and Wood (U. S.) on the same subject.

Hides, Sale of.—Macklem v. Thorne, 30 U. C. R., 464; *Oliver qui tam v. Hyman*, 30 U. C. R., 517.

Hire of Goods.—Sinclair's D. C. Act, 1879, 66. See "Bailment," *supra*; 3 Mew's Digest, 2149, 2151, 2152-2154, 2026-2031; Smith on Negligence, 25, 74, 121, 122; Oliphant on Horses under "Hiring Horses;" Taylor on Ev., 8th Ed., 726, 727; Add. on Con., 8th Ed., 343-348; R. & J., 1657, 4508; Ont. Digest, 1884, 550; Ont. Digest, 1887, 304, 305; 3 Mew's Digest, 2149; Broom's Com. Law, 7th Ed., 158; L. R. Digest, 1880, 1784.

Hiring furniture, custom of the trade: 18 Ch. D., 30; 23 Ch. D. 261.

Hiring rooms: 19 Ch. D., 156; 2 App. R., 291, 305; Chitty on Con.; Pollock, Finkle and Anson severally on Contracts; Smith on Con., 122, 123.

Horse.—R. & J., 1656, 4509; Ont. Digest, 1887, 305; 3 Mew's Digest, 2151; Broom's Com. Law, 7th Ed., 337, 910; Oliphant on Horses; Hanover (U. S.) on Horses; Taylor on Ev., 8th Ed., 58, 283, 342, 533, 534; Lascelles on Horse Warranty; R. S. O., 422, 4346.

Horse-race: See 9 Ont. R., 435; Pollock on Torts, 40, 405; Smith on Negligence, 122, 123, 172.

"Animals," driving, &c.: Smith on Negligence, 187, and pages cited; L. R. Digest, 1880, 1784; Sinclair's D. C. Law, 1884, 123, 228; Campbell on Negligence, 26, 56, 67, 75, 70.

Husband and Wife.—In the work of the writer on Division Courts, written in the year 1879, the subject of married women in relation to their rights and liabilities was somewhat touched upon.

Since then the Married Woman's Property Act of 1884 has been passed, and in a large measure enlarges the rights of married women and also affects their liability.

A discussion of that Act will be found in Sinclair's D. C. Law, 1885, at pages 67-76, 102, 269-273.

A fuller discussion of the subject, and especially in view of some recent decisions is now rendered, necessary.

It is proposed also to consider, to a limited extent, the general liabilities of the husband as resulting from his marriage and to give a few general rules of law thereon as pertinent to Division Court practice.

As nearly everybody is aware, the rights of a married woman to her separate property are regulated now by recent legislation. Our Statute of 1884 is substantially a copy in all material particulars of the English Act of 1882 on the same subject. The phraseology being generally the same, the decisions of the English Courts must necessarily be binding in this Province.

We think this unfortunate, for in many cases we are of the opinion that what the legislature intended to effect has, in a measure, proved abortive. Some of our decisions have followed what some Courts conceived the spirit of our legislation, but the majority of the decisions, especially of our Court of Appeal, has followed the English cases.

As we are well aware at common law the rights of a married woman to her separate property were very limited indeed. Her husband became possessed of nearly all of it on marriage and it became subject to her husband's debts.

It is not necessary here to discuss that subject further, but the student of that branch of law will find it commented on in Addison on Contracts, 8th Ed., 132, and following pages. The Married Women's Property Act of Ontario will be found as Chapter 132 of the Revised Statutes of Ontario, and the English Act of the same character will be found in Addison on Contracts, 8th Ed., 1321-1328.

A man cannot be rendered liable on any deed executed in his name by his wife, nor can she: Add. on Con., 8th Ed., 135. But if work has been performed or services rendered, or goods supplied for the use of the husband upon the faith of the covenant by the wife for payment or remuneration, the husband is liable for the fair value of the work and services and of the goods supplied, just as if the covenant had never been in existence. *Idem*.

The authority of a wife to sign contracts in his name depends on the nature of the contract and the authority which she impliedly or expressly has. The authority of a wife in all cases to act for her husband depends on the question of agency. A married woman has, in general, no implied authority to borrow money and charge the husband with its repayment, but such small sums as a wife may require upon an emergency for household expenses, medicines, or necessaries, a third party would be justified in lending her, and a person who has advanced money to the wife for necessaries may be entitled to stand in the place of the person who actually supplied the necessaries: Add. on Con., 8th Ed., 135, 136.

A married woman residing with her husband and having the general management of his house, is presumed to be his general agent for the domestic economy of the house and family, and is clothed with an implied authority from the husband to give orders for wearing apparel, furniture, provisions, and all such things as may fairly be presumed necessary for the decent maintenance of herself, her husband and family and the general comfort and enjoyment of the household, according to the apparent circumstances and situation in life of her husband, and the position in society which he allows her to assume: *Jolly v. Rees*, 15 C. B. N. S., 643, approved of in the House of Lords in *Debenham v. Mellon*, 6 App. Cas., 24.

In the last case it was further held that the question whether a wife is invested with the authority of an agent is one of fact, depending upon the circumstances of each case.

The articles must be suitable to the style in which the husband lives: *Phillipson v. Hayter*, L. R., 6 C. P., 38 and *Debenham v. Mellon*, *supra*.

If ready money is furnished her to pay for such things, or if they are extravagant for her husband's station in life, or if her husband has forbidden credit to be given her, he is not responsible: Add. on Con., 137, or if he has supplied her with such articles: *Archibald v. Flynn*, 32 U. C. R., 523; *R. & J.*, 1674-1677.

If the husband assents to the wife's contracts, for which he would not otherwise be responsible, he might render himself liable thereon: Add. on Con., 8th Ed., 137, 138.

The wife being known to the creditor to have property and means, and he having made his debtor of her and given her credit, and not the husband, cannot afterwards change his mind and recover their price from the husband. He must look to her: Add. on Con., 8th Ed. Where a tradesman trusts a woman, not knowing her to be married, he cannot, on discovering her marriage, charge them to her husband, unless they have been used by the husband or consumed in his house, or he has in some way sanctioned or adopted the wife's contract: Add. on Con., 139.

The remedy of creditors against the separate estate of married women depends on circumstances. If a married woman has no separate property at the time of the alleged contract she cannot contract. The Act has not altered her liability in that respect: *Sinclair's D. C. Law*, 1885, 71 and seven following pages.

It is still necessary for a plaintiff to shew that the married woman had separate property at the time of the contract before he can recover—that is in following the English cases—that the onus is on him. There is no presumption that she had such property from the fact of the contract: *Palliser v. Gurney*, 19 Q. B. D., 519; *In re Shakespear*. *Deakin v. Lakin*, 30 Ch. D., 169. In the case in 19 Q. B. D., *LOPES, L. J.*, says at page 521: "The disability of a married woman to contract was removed by the Married Women's Property Act, 1882," (from which ours is substantially taken), "but only to this extent, that she may now enter into a binding contract in respect of her separate property. If she has no separate property, she still cannot contract." Further on the same learned Judge says: "I think, therefore, that to entitle the plaintiff to succeed, he must prove the existence of some separate property at the time of entering into the alleged contract." In order to constitute property "separate" within the meaning of the Act, it must be acquired during coverture. If acquired while she was a *feme sole* it is not separate property: *Wilcock v. Noble*, L. R., 7 H. L., 580; *In re Price*; *Stafford v. Stafford*, 28 Ch. D., 709; *In re Young*; *Trye v. Sullivan*, 28 Ch. D., 705; *Sinclair's D. C. Law*, 1885, 74, 75.

As to the remedies against married women on their separate contracts and the proper mode of proceeding thereon, see *Add. on Con.*, 8th Ed., 139-141.

The marriage is proved by reputation. If parties live together as husband and wife this is sufficient in an action arising from that relation: *Add. on Con.*, 8th Ed., 141; *Taylor on Evidence*, 8th Ed., 190, 514, 515.

Those who furnish the wife with the means of subsistence after a separation by reason of the wife's adultery, have no claim against the husband thereof, whether they had notice of the adultery or not at the time they furnished the goods; for the implied authority of a wife who is not living with her husband, to bind her husband by her contracts for necessities is put an end to by the adultery: *Cooper v. Lloyd*, 6 C. B. N. S., 524.

The previous adultery and misconduct of the husband form no excuse in point of law for the infidelity of the wife: *Add. on Con.*, 8th Ed., 141.

If condonation takes place and the husband receives the wife back again she is received with all her original rights, unless she again commits adultery: *Add. on Con.*, 8th Ed., 141, 142.

If a wife commits adultery with the connivance of her husband, and he subsequently turns her out of doors, she has the right to pledge his credit for necessities: *Wilson v. Glossop*, 19 Q. B. D., 379.

Where, during the husband's absence, the wife places herself and their children under the protection of a man, with whom the wife maintains an adulterous relation, without the husband's knowledge, he is not responsible for things furnished to the children on the wife's order if he has supplied her with money adequate for her maintenance and that of the children: *Atkins v. Pearce*, 2 C. B. N. S., 763.

If the wife leaves the husband without just cause, she cannot procure subsistence elsewhere at his expense: *Add. on Con.*, 8th Ed., 142.

If the husband separates from his wife and leaves her destitute, without being able to prove that she has forfeited her rights by adultery, the law gives her a right to support herself upon the credit and at the expense of her husband; and any tradesman who at her request supplies her with necessities

suitable to her station in life, in contemplation of law supplies them to the husband himself, and may recover the amount as a debt by the husband to the tradesman: Add. on Con., 8th Ed., 142.

In *Bazeley v. Forder*, L. R., 3 Q. B., 559, it was held that the husband was liable to one who had supplied necessaries for the maintenance of his infant children upon the order of his wife, the children being of tender years, living with her against his will, by order of the Court. That case is not reliable law in this Province, because it was decided upon a Statute, not in force here, imposing on the father the obligation of supporting his children under seven years of age.

Where the husband has, either by desertion of his wife, cruel treatment or expulsion of her from his house, rendered supplies necessary, she has implied authority to pledge his credit for *necessaries*, as above remarked: Add. on Con., 8th Ed., 142-144.

What are "*necessaries*" is a question of fact depending on a variety of circumstances. What might be necessaries for one woman might be extravagance in another, so that after all it is a question of fact to be determined from the circumstances of each case.

The cases in which the question has arisen are not few, and will, in the English Courts, be found in 4 Mews' Digest, 313-323, and in Ontario in B. & J's Digest, 1674-1677; Add. on Con., 8th Ed., 144. Ont. Digest, 1887, 311.

As to what are necessaries for which the husband is liable, supplied to the wife while she is living with him, see 4 Mews' Digest, 306-313.

The death of the husband does not render the wife responsible upon any contracts made by her during coverture, nor is she responsible upon any promise made after the death of the husband to pay for things furnished to her in his lifetime.

Contracts entered into by the wife after the death of the husband, but before it was known, are not binding on her: Add. on Con., 8th Ed., 146; Smout v. Ilberry, 10 M. & W., 1.

If a man lives with a woman as his wife, though not so, she has all the implied authority of a wife to contract debts in his name: Add. on Con., 8th Ed., 146, 147.

Where a husband and wife live apart by mutual consent, and nothing is said about her maintenance, and she has no means and cannot maintain herself, a jury may infer that the husband meant his credit should be pledged by her: *Johnston v. Summer*, 3 H. & N., 261.

The onus is on the creditor, and such authority cannot be implied: *Idem*.

Where the husband promises to pay a third party a specific weekly sum for his wife and family, and fails to do so, a tradesman may supply her with necessaries and recover against the husband therefor: *Collier v. Brown*, 3 F. & F., 67.

Though the wife, in case of separation by consent without an allowance, deals for her husband, he will be discharged if the dealing took place on the credit of another: *Harvey v. Norton*, 4 Jur., 42.

There is no authority in law in a married woman living apart from her husband to borrow money on his credit: *Paule v. Goding*, 2 F. & F., 585.

A man who advances money to the wife of a man who is abroad, for her necessary support, acquires no equitable right against the husband therefor: *May v. Skey*, 16 Sim., 588.

A husband is liable for medical attendance rendered necessary in part by his cruelty: *Beale v. Arabin*, 36 L. T. N. S., 249.

A husband may be rendered liable for goods which his wife improvidently takes up of a tradesman, where, having control of the goods, he does not return when it comes to his knowledge: *Waithman v. Wakefield*, 1 Camp., 120.

A party suing a husband for goods supplied to his wife as necessaries, must shew the existence of such facts as rendered their supply necessary: *Edwards v. Towels*, 5 M. & G., 624; *Bird v. Jones*, 3 M. & R., 121; *Dennys v. Sargeant*, 6 C. & P., 419. The costs of a wife's funeral may be necessaries: *Bradshaw v. Beard*, 12 C. B. N. S., 344.

A husband who has been in the habit of dealing with a tradesman in cash is not bound to inform him of the separation from his wife in order to escape liability: *Wallis v. Biddick*, 22 W. R., 1, but if he had been dealing previously on credit, it would have been different. *Idem*.

A husband is not liable for necessaries furnished to his wife living apart from him (the cause not appearing), if she has a sufficient separate maintenance, although no part of it is supplied by the husband: *Clifford v. Laton*, 3 C. & P., 15.

If husband and wife separate by mutual consent, the husband is liable for reasonable maintenance for his wife, unless she has a competent provision either from her husband or some fund of her own; and if she has such provision, it lies on the husband to shew that: *Dixon v. Hurrell*, 8 C. & P., 717; *Archibald v. Flynn*, 32 U. C. R., 523.

A mere notice to the creditor will not remove the liability: *Dixon v. Hurrell*, *supra*. In view of the later cases, and especially *Archibald v. Flynn*, *supra*; *Zealand v. Dewhurst*, 23 C. P., 117; it must be doubted in *Lidlow v. Wilmot*, 2 Starkie, 86; *Thompson v. Harvey*, 4 Burr., 2177; are now law.

If a husband makes an adequate allowance to his wife living apart from him, he is not responsible for necessaries supplied to her, and notice is not necessary: *Hodgkinson v. Fletcher*, 4 Camp., 70; *Mixen v. Pick*, 3 M. & W., 481; *Rawlins v. Vandyke*, 3 Esp., 250; *Reeve v. Conynham (Marquis)*, 2 C. & K., 443; *Holder v. Cope*, 2 C. & K., 437; *Biffen v. Bignell*, 7 H. & N., 877; *Mallalieu v. Lyon*, 1 F. & F., 431.

Inadequacy of the wife's income is no reason for rendering the husband liable: *Eastland v. Burchell*, 3 Q. B. D., 482; *Emmett v. Norton*, 8 C. & P., 506.

A reasonable apprehension of improper restraint of the wife will justify her in removing to another house and render him liable for necessaries: *Tempny v. Hakewill*, 1 F. & F., 438; *Houliston v. Smyth*, 3 Bing., 127.

Where a wife is turned out of doors and necessaries are supplied her, the husband is liable therefor: *Johnston v. Manning*, 12 Irish C. L. R., 148; *Forristall v. Lawson*, 34 L. T. N. S., 903; *Harris v. Morris*, 4 Esp., 41; *Johnston v. Summer*, 3 H. & N., 261; *Harrison v. Grady*, 13 L. T. N. S., 369; *Shepherd v. Mackoul*, 3 Camp., 326.

When desertion renders the husband liable: See *Jenner v. Hill*, 1 F. & F., 269; *Deare v. Soutton*, L. R., 9 Eq., 151; *Jenner v. Morris*, 7 Jur. N. S., 375.

When law costs are necessaries: See *Wilson v. Ford*, L. R., 3 Ex., 63; *Ottaway v. Hamilton*, 3 C. P. D., 393; *Stockton v. Pottrick*, 29 L. T. N. S., 507; *Rice v. Shepherd*, 12 C. B. N. S., 332; *Baylis v. Watkins*, 9 L. T. N. S., 741; *Meeredy v. Taylor*, 7 Irish C. L. R., 256.

The onus of shewing that goods supplied are necessaries is upon the tradesman: *Reed v. Moore*, 5 C. & P., 200; *Mainwaring v. Leslie*, 2 C. & P., 507.

As to the adulterous conduct of the wife: See 4 Mews' Digest, 323.

Where there is a voluntary separation without the wife's having any

adequate support, the husband is liable for necessaries: *Tait v. Lindsay*, 12 C. P., 414. But not if he has even turned her out of the house and she has been supplied by others with similar goods: *Archibald v. Flynn*, 32 U. C. R., 523; *Zealand v. Dewhurst*, 23 C. P., 117.

Where it is unsafe and uncomfortable for the wife to remain in her husband's house, he may be made liable for necessaries: *Griffith v. Paterson*, 20 Grant, 615.

It was held, in *Ross v. Codd*, 7 U. C. R., 64, that a defendant's endorsement made by his wife, though in her own name but afterwards recognized by the defendant, rendered him liable to an action on the bill as for money paid.

Where a wife took an active part in her husband's business and had the custody of his money, sums paid to her were treated as sums paid to the husband: *Robinson v. Coyne*, 14 Grant, 561.

During a husband's imprisonment, a wife may contract as to goods and chattels as a *feme sole*: *Crocker v. Sowden*, 33 U. C. R., 397.

Sometimes a wife's admissions may bind her husband, but it is on the principle of agency after all: *Taylor on Ev.*, 8th Ed., 534, 675. Thus, where a wife is authorized in her husband's absence to carry on the business of his shop, her admissions made on application to pay for goods previously delivered at the shop will be received in evidence against the husband: *Clifford v. Burton*, 1 Bing., 192. But her acknowledgments of an antecedent contract for the hire of the shop, or her agreement to make a new contract for the future occupation of it, will be rejected, as it cannot be necessary that the wife should have this extensive power of binding her husband for the mere purpose of conducting the business of the shop: *Meredith v. Footner*, 11 M. & W., 202.

We see no reason now why an action could not be sustained against the husband and wife jointly where the facts appeared that the wife had contracted as a married woman and also as the agent of her husband. It should clearly be made to appear that such was the contract and that she possessed the necessary authority of her husband to contract for him. But see *Horner v. Kerr*, 6 App. R., 30.

A contract could be made by a married woman, either on her own behalf or that of her husband, or both, by telegram, and the contract would be complete at the place from which and when it was transmitted: *Perry v. Mount Hope Iron Co.*, 34 Alb. L. J., 297.

It was doubted in *Horner v. Kerr*, 6 App. R., 30, whether a married woman could be made responsible on a joint contract, and it was the opinion of BURTON, J., that in an action against two makers of a joint and several note, one of whom was a married woman, that a failure to recover against one was a failure as to both. It must be observed, however, that that case was decided before the Ontario Judicature Act, which probably has produced a change in that respect.

In Torts the principle of agency does not apply (we mean the maxim, "let the principal answer"), each wrong-doer being a principal: *The Ontario Industrial & Investment Co. v. Lindsey*, 4 Ont. R., 473. And a husband and wife may be jointly liable for a Tort: *Barker v. Westover*, 5 Ont. R., 116.

We have to repeat that the rights and liabilities of a married woman are now mainly regulated by "The Married Women's Property Act," Chapter 132 of the Revised Statutes of Ontario, but the common law in respect to married women is only changed so far as legislation has effected it and no more: *Kraemer v. ...*, 10 C. P., p. 475, per DRAPER, C. J.; *Horner v. Kerr*, 6 App. R., per BURTON, J.; *Carlisle v. Tait*, 7 App. R., 31, per PATTERSON, J.; *Patterson v. ...*, 33 Q. B. D., 519.

On the subject of addition to the authorities cited: See R. & J., 1661-1702;

33 Albany L. J. on the same subject, 354; Ont. Digest, 1884, 317; Ont. Digest, 1887, 305; 4 Mews' Digest, 1; Broom's Com. Law, 7th Ed., 1083, and pages cited; Current Index, 1887, L. R., 61, 72; Sinclair's D. C. Law, 1884, 142; D. C. Law, 1885, 302-303, and pages cited; Griffith on the Married Women's Property Acts; Redman, Thicknesse, Lennard, Smith and White and Blackburn on the same subject; 10 Cent. Rep., 187, 189; 12 West. Rep., 405.

As to what are "necessaries" for a wife: See Browne on the Interpretation of Words, 274-279, 19 Q. B. D., 7, 88, 379, 519; Sinclair's D. C. Law, 1884, 142; D. C. Law, 1885, 302, and pages cited.

Identity.—R. & J., 1703-1708; Ont. Digest, 1887, 316; 4 Mews' Digest, 427; Broom's Com. Law, 7th Ed., 505, 506; Roscoe's N. P. Ev., title "Identity"; Taylor on Ev., 8th Ed., 1690, 1691, and pages cited; Pollock on Torts, 380-384; 11 P. D., 31; Wills on Circumstantial Ev., 3rd Ed., 90-104; Greenleaf on Ev., title "Identity"; 1 Lewin C. C., 25; Carr. & M., 297; 4 F. & F., 103; Emden's Digests.

Illegality.—R. & J., 1708; 4 Mews' Digest, 428; Broom's Com. Law, 1069, and pages there cited; see *ante*, page 71, title "Illegal Promissory Notes," and authorities there referred to, and page 76 *hereto*.

Illegality may be shewn by parol: Smith's Master and Servant, 47, note (u); Emden's Digests; 37 Alb. L. J., 83; Benjamin on Sales, title "Illegality."

Imprisonment.—See "False Imprisonment" in this work, page 92. R. & J., 1710; Ont. Digest, 1884, 331; Ont. Digest, 1887, 317; 4 Mews' Digest, 428; Emden's Digests; Broom's Com. Law, 7th Ed., 1062, and pages cited; L. R. Digest, 1880, 1646, 1647; Taylor on Ev., 8th Ed., 1677, and pages cited; Roscoe's N. P. Ev., title "False Imprisonment."

Indemnity.—Sinclair's D. C. Act, 1879, 66; R. & J., 1628-1645, 4506-4508; Ont. Digest, 1884, 311-314; Ont. Digest, 1887, 298-300; 4 Mews' Digest, 428; 6 Mews' Digest, 101-248; L. R. Digest, 1880, 1846-1849; L. R. Digest, 1885, 662-664; De Colyar on Guarantees; Taylor on Ev., 8th Ed., 1790, and pages cited; see "Guarantee and Indemnity," *ante*, page 94, and works, etc., there cited; Emden's Digests.

Infant.—R. & J., 1723-1748; Smith's Master and Servant, 4th Ed., 726, and pages referred to; Taylor on Ev., 8th Ed., 1694, and pages there cited; Ont. Digest, 1884, 334; Ont. Digest, 1887, 320; R. S. O., 470; R. S. C., 1693-1698; 4 Mews' Digest, 438; Broom's Com. Law, 7th Ed., 1071, and pages cited; Add. on Con., title "Infant"; Chitty on Con.

As to necessities: See 19 Q. B. D., 509.

He must repudiate his contract within a reasonable time after coming of age: Foley v. Can. P. L. & S. Society, 4 Ont. R., 38; 12 West. Rep., 524.

As to a contract by an infant for necessities: See particularly 4 Mews' Digest, 441; Johnstone v. Marks, 19 Q. B. D., 509; Haines v. Guthrie, 13 Q. B. D., 818; Current Index, 1887, L. R., 62; Browne (U. S.) on the Interpretation of Words, 274-277; Roscoe's N. P. Ev., title "Infant"; Agnew on Stat. of Frauds, 38, 120, 417; L. R. Digest, 1880, 1854-1877; L. R. Digest, 1885, 665-675; 2 White & Tudor's L. C. Equity, title "Infants"; Parsons (U. S.) on Con.; Pollock on Con.; Ewell (U. S.) on Infancy; Schouler (U. S.) on Domestic Relations; Tyler (U. S.) on Infancy; Current Index, 1887,

L. R. 62, 63; 13 Ont. R., 128; 13 App. R., 534; Emden's Digests; R. S. O. Index XL., and pages cited; R. S. O., title in Index "Infants."

Innkeeper.—R. & J., 1789-1791; Ont. Digest, 1884, 350, 752; Ont. Digest, 1887, 329; 4 Mews' Digest, 523; Taylor on Ev., 8th Ed., 6, 206, 207, 1010; Broom's Com. Law, 7th Ed., 1073, and pages cited; 36 Alb. L. J., 354; Fisher v. Kelsey, 35 Alb. L. J., 404; L. R. Digest, 1880, 1883-1909; L. R. Digest, 1885, 679-685; Add. on Con.: Chitty on Con.; Anson, Leake, Parsons (U. S.). Pollock and Wharton on Contracts; Champion, Clifton, Lascelles, Redfield, Rogers and Whitely on Innkeepers; 18 Q. B. D., 248.

Has lien on property of third person: Cook v. Prentice, 34 Alb. L. J., 93; 33 Alb. L. J., 182, 259; 35 Alb. L. J., 318, 376, 416, 478, 404; 36 Alb. L. J., 342, 448; Emden's Digests.

Guests' goods exempt from distress: Woodfall's L. & T.; R. S. O., page 1320.

Insolvent Persons, Assignment by.—R. S. O., 1197-1206.

Insurance.—R. & J., 1793-1883; Broom's Com. Law, 7th Ed., 1073, and pages cited; Ont. Digest, 1884, 351; Ont. Digest, 1887, 930; 4 Mews' Digest, 540; 12 App. Cas., 128, 11; L. R. Digest, 1880, 1914-1983; Cassell's Digest, 195-222; L. R. Digest, 1885, 686-697; Current Index, 1887, L. R., 63, 64; R. S. O., 1232, 1557, 462, 918, 1313, 1563-1605, 1269-1275; Bennett on Fire Ins.; Bigelow on Life and Acc. Ins., and other works on this subject.

Interest on Money.—Sinclair's D. C. Act, 1879, 64; R. S. O., pages 470, 707-709. The law of England does not allow interest except by statute or contract, or the law merchant: *In re Gosman*, 17 Ch. D., 771; 4 Mews' Digest, 923-947; R. & J., 1885-1891, 4577, 4578; Ont. Digest, 1884, 385-387; Ont. Digest, 1887, 347-349; Add. on Con., 8th Ed., 673, 1102, 1264-1266; Blackburn on Sale, 2nd Ed., 532-536.

In the case of *St. John v. Rykert*, 10 Sup. R., 278, the covenant on which the rate of interest allowable turned was in these words: "The said sum of \$3,000 on the 11th day of July, 1862, with interest at the rate of 24 per cent. per annum until paid," meant "that interest at the specified rate is to be paid up to the 11th day of July, 1862, the day fixed for payment by the terms of the covenant, and that it is not to be interpreted as a covenant for payment of interest, at the rate of 24 per cent., after the 11th day of July, 1862, if the principal should then remain unpaid," *per Strong, J.*, at page 288. On the same subject see *Dalby v. Humphrey*, 37 U. C. R., 514; *Simonton v. Graham*, 8 P. R., 495; *McDonald v. Elliott*, 12 Ont. R., 98; 34 Albany L. J., 244; *Danforth's (U. S.) Digest*, 570-572, and the Statutes of Ontario on the subject; *R. v. County Court Judge of Essex and Clarke*, 18 Q. B. D., 704; *Hawksford v. Giffard*, 12 App. Cas., 122; *In re Marshfield*, *Marshfield v. Hutchings*, 34 Ch. D., 721; *Lumley v. Simmons*, 34 Ch. D., 698.

On the subject of interest, the law of England was lately expressed by Lord Esher, in *R. v. C. C. Judge of Essex*, 18 Q. B. D., 704; Current Index, 1887, L. R., 64; Broom's Com. Law, 7th Ed., 1073, and pages cited; *McCracken v. Creswick*, 8 App. R., 501; *Cook v. Fowler*, L. R., 7 H. L., 27; *In re Widmeyer v. McMahon*, 32 C. P., 187; *Burns v. Rodgers*, 17 L. J. N. S., 209; *Popple v. Sylvester*, 22 Ch. D., 98; *Re Roberts*, 14 Ch. D., 49; *Simonton v. Graham*, 8 P. R., 495; 42 L. T. N. S., 666; *St. John v. Rykert*, 4 App. R., 213; *Wallace v. Souther*, 2 Sup. R., 598; Cassell's Digest, 223; *Ewing v. Ewing*, 8 App. Cas., 822; *Wilkins v. Geddes*, 3 Sup. R., 203; Sinclair's D. C. Law, 1884, 117-119.

The late decision of the Court of Appeal of Ontario in *Powell v. Peck*, (not yet reported), was to the effect that the words "interest at eight per cent. till paid," did not mean at that rate after the maturity of the mortgage, and upheld the opinion expressed by *PROUDFOOT, J.*, in 12 Ont. R., 492, in that case. To the same effect is the decision of the Supreme Court of Mississippi in *Hamel v. Rigby*, decided on the 21st of November, 1887; *Mayne on Damages*, title "Interest," 15 L. J. N. S., 32; *De Colyar on Guarantees*, 209, 281, 282, 371, 372; *Blackburn on Sale*, title "Interest,"; *Leake, Pollock, Parsons*, (U. S.), *Anson and Chitty on Contracts*, title "Interest." When interest payable on rent in arrear: See *Woodfall on L. & T.*, title "Interest."

Interpleader.—R. & J., 1892-1906; 19 Q. B. D., 139; Ont. Digest, 1884, 388; Ont. Digest, 1887, 352; 4 Mews' Digest, 1047; Current Index, 1887, L. R., 64; Broom's Com. Law, 7th Ed., 1074, and pages cited.

An interpleader issue is not an "action" within the judicial meaning of that word: *Collis v. Lewis*, Weekly Notes, 1887, 256.

As to the value of goods as regulating the right of appeal, see *White v. Milne*, Weekly Notes, 1887, 256; *Cababe on Interpleader*, L. R. Digest, 1880, 1993-1996; L. R. Digest, 1885, 700; see the different parts of this work, title "Interpleader," R. S. O., 506, 739-742.

Interpretation Act.—R. S. O., 1, 9, 500.

Intoxicating Liquors.—Ont. Digest, 1887, 357; 4 Mews' Digest, 1081; see the notes to Section 69, *ante*, pages 68-71, and the titles "Spirituous or Malt Liquors"; Broom's Com. Law, 7th Ed., 1074, and pages cited; Ont. Digest, 1887, 357; See title in this book "Drunkenness."

Judge.—R. & J., 1911; Ont. Digest, 1884, 391; Ont. Digest, 1887, 380; 4 Mews' Digest, 1144; R. S. O., pages xix., xx., Index.

A judicial officer cannot delegate his judicial functions: *In re Queen City Ref. Co.*, 10 P. R., 415; D. C. Law, 1885, 67; 35 Ch. D., 128; Broom's Com. Law, 7th Ed., 1075, and pages cited; *Roscoe's N. P. Ev.*, title "Judge," Taylor on Ev., 8th Ed., 1702, 1703, and pages cited; R. S. O., 492.

Void Judgment can be set aside any time: *Sup. Ct. Cal. in People v. Greene*, 23rd Dec., 1887.

Judgment.—R. & J., 1912-1958; Ont. Digest, 1884, 391; Ont. Digest, 1887, 367; 4 Mews' Digest, 1148; Current Index, 1887, L. R., 65; Broom's Com. Law, 7th Ed., 1075, and pages cited; *Fraudulent Judgment*, *Cassell's Digest*, 225-229; *Agnew on the Stat. of Frauds*, 450-455; *Roscoe's N. P. Ev.*, title "Judgment," Taylor on Ev., 8th Ed., 1702, and pages cited; R. S. O., 471, 1002, 1053, 1201.

Judgment Creditor.—R. & J., 1960-1963; 18 Q. B. D., 201; 34 Ch. D., 345; Broom's Com. Law, 7th Ed., 728.

Jurisdiction.—Sections 69 and notes; Current Index, 1887, L. R. 66.

Jury.—R. & J., 1964-1968; Ont. Digest, 1884, 393; Ont. Digest, 1887, 471; 4 Mews' Digest, 1165; R. S. O., 610; Current Index, 1887, L. R., 96; Broom's Com. Law, 1076, and pages cited; L. R. Digest, 1880, 2041; L. R. Digest, 1885, 730; Broom's Com. Law, 7th Ed., 1076, and pages cited; R. S. O., 610, 658, 505, 881.

Jus Tertii.—R. & J., 1968; Hall v. Griffith, 5 Ont. R., 478; 4 Mews' Digest, 1177; Ont. Digest, 1884; Ont. Digest, 1887; L. R. Digest, 1885, 731; *Ex parte Davies*. In re Sadler, 19 Ch. D., 86; Pollock on Torts, 300; Add. on Torts.

Justice of the Peace.—R. & J., 1971-2001; Ont. Digest, 1884, 400; Ont. Digest, 1887, 381; 4 Mews' Digest, 1177; R. S. O., 506, 554, 814; Broom's Com. Law, 1077, and pages cited; L. R., 1880, 2042-2065; L. R., Digest, 1885, 731, 732; Pollock on Con., 180, 230h; Burn's Justice, title "Justices of the Peace;" Saunders on Justices of the Peace, 5th Ed., 728-732, and pages there referred to; Add. on Torts; R. S. O., 506, 554, 781, 814, 792, 798.

Laches.—R. & J., 2003-2007; Ont. Digest, 1884, 404; Ont. Digest, 1887, 390; 4 Mews' Digest, 1295; L. R. Digest, 1880, 1393-1395; L. R. Digest, 1885, 502, 947; Broom's Com. Law, 7th Ed., 464, 929; Taylor on Ev., 160.

Landlord and Tenant.—Sinclair's D. C. Act, 1879, 66; 4 Mews' Digest, 1299-1686; R. & J., 2010-2098, 4591-4599; Ont. Digest, 1884, 406-414; Ont. Digest, 1887, 393-403; Danforth's (U. S.) Digest, 638-641; Taylor on Ev., 8th Ed., 1706, and pages cited there; Woodfall's L. & T.; Smith on Negligence, 47-49; Pollock on Torts, 288-350; De Colyar on Guarantees, 2nd Ed., 67-69, 122-125, 146, 147.

What taxes a tenant is not liable for under a covenant or agreement to pay: See Wilkinson v. Collier, 13 Q. B. D., 1; Broom's Com. Law, 7th Ed., 1077, and pages cited; R. S. O., 2149.

Lands Titles Act.—R. S. O., 1087-1127.

Lease.—See "Landlord and Tenant," ante; R. S. O., 961, 962, 1314, 1318.

Leave and License.—R. & J., 2100, 4599, 4600; Ont. Digest, 1884, 417; Ont. Digest, 1887, 404; 4 Mews' Digest, 1842; Broom's Com. Law, 7th Ed., 801; Taylor on Ev., 8th Ed., 1710, and pages cited; Pollock on Torts, 138, 186, 139-142, 305-308; Smith on Negligence, 28, 37, 224; Bullen and Leake, title "Leave and License;" Chitty's Pre. in Pleading, 3rd Ed., 706; L. R. Digest, 1880, 2183, 2195; Emden's Digests.

Legacy.—R. & J., 2101-2103; Ont. Digest, 1884, 416, 794; Ont. Digest, 1887, 403; 2 White and Tudor's L. C. Equity, 1149-1152, and pages there cited; Hanson, Koper, Preston and Ward each on Legacies; Redfield (U. S.) on Legacies; Williams on Executors; Theobald on Wills; Walkem on Wills; Hawkins on Wills; R. S. O., 1019; Emden's Digests.

License.—R. & J., 2105-2112; Ont. Digest, 1884, 417, 752; Ont. Digest, 1887, 404; 4 Mews' Digest, 1849; Broom's Com. Law, 7th Ed., 1080, and pages cited. See note on "Leave and License."

Lien.—R. & J., 2113-2119, 4600; Ont. Digest, 1884, 417; Ont. Digest, 1887, 404; 4 Mews' Digest, 1856; Current Index, L. R., 1887, 69; Broom's Com. Law, 7th Ed., 1080, and pages cited; Taylor on Ev., 8th Ed., 1710 and pages cited; De Colyar on Guarantees, 65, 66, 118, *et seq.*, 130, 131, 143, 144; Pollock on Torts, 296; Blackburn on Sale, 410, and pages cited; L. R. Digest, 1880, 2196-2198; L. R. Digest, 1885, 799; Emden's Digests.

Limitation of Actions.—R. & J., 2121-2170; Ont. Digest, 1884, 422; Ont. Digest, 1887, 408; 4 Mews' Digest, 882; Banning on Limitations; L. R. Digest, 1880, 2208-2244; L. R. Digest, 1885, 804-811; Current Index, 1887, L. R., 69, 70; Emden's Digests; Broom's Com. Law, 7th Ed., 1117 and pages cited; 37 Alb. L. J., 80; Add. on Con., title "Limitation of Actions;" Add. on Torts, same title; Pollock on Torts, 47, 178, 179, 181; Smith's Master and Servant, 272d, 530; Taylor on Ev., 8th Ed., 1710-1712, and pages cited; R. S. O., 606, 707, 709, 785, 884.

Liquidated Damages.—Sinclair's D. C. Act, 1879, 66. In addition to the authorities there cited, see Mayne on Damages, 3rd Ed., 122-131; 5 Mews' Digest, 1183-1197; R. & J., 2742-2745, 4661; Craig v. Dillon, 6 App. R., 116; Brussels v. Ronald, 4 Ont. R., 1; Chatterton v. Crothers, 9 Ont. R., 683; Schrader v. Lillis, 10 Ont. R., 368; Danforth's (U. S.) Digest, 307; 119 U. S., 495; Add. on Con., 1110, 1111, 1118, 1116; L. R. Digest, 1880, 1354, 1355, 2244; Wallis v. Smith, 21 Ch. D., 243; Bignall v. Gould, 35 Alb. L. J., 113; Taylor on Ev., 8th Ed., 62, 358; 4 Mews' Digest, 2035; Broom's Com. Law, 7th Ed., 646 *et seq.*; R. S. O., 459, 555; Emden's Digests; 21 Ch. D., 243.

Lord's Day.—R. S. O., 2253-2257; Add. on Con., 8th Ed., 1163; 6 Mews' Digest, 2096-2102; Taylor on Ev., 8th Ed., 21; Smith's Master and Servant, 47; 7 B. & C., 596; Pollock on Torts, 152; 8 B. & C., 769; 5 M. & P., 122; 7 Bing., 320. See "Sunday," *post*; R. S. O., 2253-2257.

Lunatic.—R. & J., 2178-2184; Ont. Digest, 1887, 416; 4 Mews' Digest, 2041-2063; Broom's Com. Law, 7th Ed., 1081, and pages cited; Current Index, 1887, L. R., 71; Story's Eq. Jur.; L. R. Digest, 1880, 2342-2362; L. R. Digest, 1885, 838-848; R. S. O., 686-691, 1257, 1052, 712, 452-455, 1261, 2586.

Malice.—Browne (U. S.) on the Interpretation of Words and Phrases, 240, 241; Broom's Com. Law, 7th Ed., 1082, and pages cited; L. R. Digest, 1885, 2365; 5 Mews' Digest, 2-58; R. S. O., 469.

Malicious Arrest, Prosecution, &c.—See pages 75, 76. Ont. Digest, 1884, 441; Ont. Digest, 1887, 317, 417, 629; 1 Mews' Digest, 442; R. S. O., 766-772; Emden's Digests; Broom's Com. Law, 7th Ed., 1082, and pages cited.

Mandamus.—R. & J., 2208-2225; R. S. O., 463; Shortt on Mandamus; Ont. Digest, 1884, 444; Ont. Digest, 1887, 420; 5 Mews' Digest, 58; Emden's Digests; Broom's Com. Law, 7th Ed., 1082, and pages there cited; pages 61-63 hereto.

Married Woman.—R. S. O., 1250-1258. See "Husband and Wife," *ante*.

Master and Servant.—R. & J., 2229-2241; Ont. Digest, 1884, 447; Ont. Digest, 1887, 424; Emden's Digests; 5 Mews' Digest, 149; R. S. O., 2439, 1283-1286, 1288-1292; 19 Q. B. D., 264; Broom's Com. Law, 7th Ed., 1085, and pages cited; Smith on Master and Servant; Fall (U. S.) on Employers' Liability; Paterson on Master and Servant; L. R. Digest, 1880, 2383-2410; L. R. Digest, 1885, 861-868.

Mechanics' Lien.—R. & J., 2118, 4601; Ont. Digest, 1884, 417; Ont.

Digest, 1887, 405; Phillips (U. S.) on Mechanics' Liens; Holmsted on Mechanics' Liens; R. S. O., 1216-1225.

Medical Attendance—Negligence.—Sinclair's D. C. Act, 1879, 66. Before R. S. O., Chap. 148, a Medical practitioner could not, in law, recover his fees: Chorley v. Bolcot, 4 T. R., 217; Veitch v. Russell, 3 Q. B., 928; but now he can recover his fees, without an express contract, under the above Statute: Gibbon v. Budd, 2 H. & C., 92; 5 Mews' Digest, 307-310; R. & J., 2241-2244, 4619-4620; Ont. Digest, 1884, 451; Ont. Digest, 1887, 427; R. S. O., 1360-1375. See next succeeding note.

Medical Practitioner.—Ont. Digest, 1887, 427; R. S. O., 6, 101, 858, 2277; 5 Mews' Digest, 298; Broom's Com. Law, 7th Ed., 328, 329, 960. See next preceding note.

Mental Incapacity.—R. & J., 2244; Ont. Digest, 1884, 452; Ont. Digest, 1887, 429; Broom's Com. Law, 7th Ed., 259, 823, 918, *et seq.* See "Lunatic" *ante*.

Mercantile Agency.—R. & J., 2244.

Merger.—R. & J., 2245-2247; Ont. Digest, 1884, 452; Ont. Digest, 1887, 429; 5 Mews' Digest, 315; Broom's Com. Law, 7th Ed., 1087, and pages cited; Add. on Con., 8th Ed., 1240; Chitty, Leake, Pollock, Parsons (U. S.) and Anson on Contracts, title "Merger"; Taylor on Ev., 8th Ed., 865, 1490; Emden's Digests.

Minor.—R. S. O., 874, 1247, 1429, 1917, 2190, 2258. See "Infant" *ante*.

Misnomer.—R. & J., 2251-2255; Ont. Digest, 1884, 452; 5 Mews' Digest, 474; L. R. Digest, 1880, 2449.

Mistake.—R. & J., 2256-2262; Ont. Digest, 1884, 453; Ont. Digest, 1887, 429; 5 Mews' Digest, 474; L. R. Digest, 1880, 2453-2455; L. R. Digest, 1885, 890.

Money Counts.—R. & J., 2264-2293, 2751, 4621; Ont. Digest, 1884, 454; 5 Mews' Digest, 476; Bullen and Leake's Pleading, title "Indebitatus Counts." See *post*.

Money Had and Received—See Sinclair's D. C. Act, 1879, 64; R. & J., 2272-2285; Add. on Con., 8th Ed., 1038-1047, 1425 and pages cited; Green v. Duckett, 11 Q. B. D., 275; Midland Ry. Co. v. Withington Local Board, 11 Q. B. D., 788; Leeds Bank v. Walker, 11 Q. B. D., 84; 5 Mews' Digest, 492-533; R. & J., 2272-2285; Owston v. G. T. Ry. Co., 28 Grant, 428; Ont. Digest, 1887, 430; Blake v. Albion Life Ass. Society, 4 C. P. D., 94; Chesney v. St. John, 4 App. R., 150; Agricultural Inv. Co. v. Federal Bank, 45 U. C. R., 214; Clarke v. White, 3 Sup. R., 309; Freeman v. Jeffries, L. R., 4 Ex., 189, 197; Nott v. Gordon, 20 L. J. N. S., 379.

When money paid under a mistake of law is recoverable back, contrary to the general rule: See *Ex parte Simmonds. In re Carnac*, 16 Q. B. D., 308. Broom's Com. Law, 7th Ed., 310, *et seq.*, 322; L. R. Digest, 1880, 2455, 2457;

L. R. Digest, 1885, 892; Chitty, Anson, Leake, Pollock, Parsons (U. S.) on Contracts, title "Money Had and Received."

Money Lent.—In addition to the works and authorities cited at page 64 of Sinclair's D. C. Act, 1879, see L. R. Digest, 1880, 9, 2456; Add. on Con., 8th Ed., 847-352; Taylor on Ev., 8th Ed., 149, 212; 5 Mews' Digest, 477-480; R. & J., 2265; Ont. Digest, 1884, 454; Ont. Digest, 1887, 430; *Re Ross*, 29 Grant, 385; Broom's Com. Law, 7th Ed., 311; all Text-writers on Contracts.

Money Paid.—At page 64 of Sinclair's D. C. Act, 1879, will be found works and authorities cited on this subject. We cite the following in addition thereto: L. R. Digest, 1880, 2456; Add. on Con., 8th Ed., 44, 1033, 1035, 1037, 1182; 5 Mews' Digest, 482-492; R. & J., 2266-2269; Ont. Digest, 1887, 430, 518; *Edmunds v. Wallingford*, 14 Q. B. D., 811. When money paid under a mistake of law is recoverable back: See *Ex parte Simmonds. In re Carnac*, 16 Q. B. D., 308. Money paid under verbal guarantee not recoverable back: *De Colyar on Guarantees*, 52; all Text-writers on Contracts.

Money; what it is.—R. & J., 2263; Ont. Digest, 1884, 454; Ont. Digest, 1887, 430; L. R. Digest, 1880, 2455-2457; L. R. Digest, 1885, 892; Taylor on Ev., 8th Ed. 185, 280, 842.

Mortgage—Chattel and Real.—R. & J., 2295-2403; R. S. O., 1207-1215, 1018, 1207-1215, 916-926, 734, 736; Ont. Digest, 1884, 454; Ont. Digest, 1887, 430; 5 Mews' Digest, 547; Broom's Com. Law, 7th Ed., 260, 435; Barron on Bills of Sale; Coote on Mortgages; Fisher on Mortgage; Herman (U. S.) on Chattel Mortgages; Jones (U. S.) on Mortgages; Millar on Bills of Sale.

Municipal Corporations.—R. & J., 2408-2509; Ont. Digest, 1884, 477; Ont. Digest, 1887, 445; 5 Mews' Digest, 682; Harrison's Mun. Manual; Broom's Com. Law, 3, 263; Dillon (U. S.) on Municipal Corporations; Arnold on the same subject; L. R. Digest, 1880, 2500-2525; L. R. Digest, 1885, 926-943.

Negligence.—R. & J., 2512-2526; Ont. Digest, 1884, 496; Ont. Digest, 1887, 468; 5 Mews' Digest, 685; Smith on Negligence; Broom's Com. Law, 1089, and pages cited; Add. on Torts; Pollock on Torts; Hilliard (U. S.) on Torts; Saunders on Negligence; Shearman & Redfield on Negligence; Thompson (U. S.) on Carriers of Passengers; Wharton (U. S.) on Negligence; Beach (U. S.) on Contributory Negligence; L. R. Digest, 1880, 2532-2563; L. R. Digest, 1885, 947-953; Roscoe's N. P. Ev., title "Negligence."

New Trial.—Sinclair's D. C. Act, 1879, 138; R. & J., 2530-2590.

New argument not new point: 8 E. & B., 664; 5 Mews' Digest, 775; Hilliard on New Trials; 34 Alb. L. J., 17; Ont. Digest, 1884, 498; Ont. Digest, 1887, 471; 8 Q. B. D., 177; 6 App. Cas., 656; Broom's Com. Law, 7th Ed., 190, 193, 211; Arch. Pract., title "New Trial;" Mayne on Damages, and Lush's Pract., same title; L. R. Digest, 1880, 2567; L. R. Digest, 1885, 953.

Improper remarks to Jury of Judge and Counsel: See 35 Alb., L. J., 204, 262, 303, 324, 436; 86 Alb. L. J., 143. Emden's Digests; Taylor on Ev., 8th Ed., 371, 672, 1591-1594; Pollock on Torts 364, 365, 375; 13 Ch. D., 52; Section 145 and notes.

Nonsuit.—R. & J., 2595-2600; 5 Mews' Digest, 782; Ont. Digest, 1884, 508; Ont. Digest, 1887, 476; Broom's Com. Law, 7th Ed., 189, 190.

On point not taken: See 23 C. P., 1; Arch. Pract., 12th Ed., and Lush's Pract., title "Nonsuit." See "New Trial" herein.

Notary-Public.—R. & J., 2600; R. S. O., 5, 718, 1054, 1418, 1419; 5 Mews' Digest, 789; Brooke on Notary Public; Tennant, on the same.

Notice.—R. & J., 2601, 4648; Ont. Digest, 1884, 508; Ont. Digest, 1887, 477; 5 Mews' Digest, 791; Broom's Com. Law, 7th Ed., 1091, and pages cited.

To be in writing now: Section 93; May on Fraud. Con., title "Notice."

Notice of Motion.—Weekly Notes, 1887, 36. See next preceding note.

Overholding Tenant.—R. S. O., 1326-1329; R. & J., 2084-2087; Ont. Digest, 1884, 412; Ont. Digest, 1887, 400; 4 Mews' Digest, 1296-1674.

Parent and Child.—R. & J., 2623; Ont. Digest, 1884, 511; Ont. Digest, 1887, 478; Broom's Com. Law, 1093, and pages cited; Ewell (U. S.) on Infants; Fraser on Parent and Child; Kelly (U. S.) on The French Law of Marriage; Schouler (U. S.) on Domestic Relations; Simpson on Infants; Edwards & Hamilton on Husband and Wife; 4 Mews' Digest, 276-282; Add. on Con., 8th Ed., 54, 123, 128, 848; 2 Ch. D., 753; 4 Mews' Digest, 438-495.

Particulars of Demand, &c.—R. & J., 2652; Ont. Digest, 1884, 577; Ont. Digest, 1887, 506; Broom's Com. Law, 7th Ed., 206; 5 Mews' Digest, 866, and references there made; Arch. Pract.; Lush's Pract., title "Particulars of Demand"; Sinclair's D. C. Act, 1879, 391, and pages there cited; L. R. Digest, 1880, 2690; L. R. Digest, 1885, 1013.

Partition.—R. S. O., 939-956, 453, 455, 906, 986.

Partnership.—R. & J., 2664-2698; Ont. Digest, 1884, 580; Ont. Digest, 1887, 507; 5 Mews' Digest, 866; Lindley on Partnership; Pollock on Partnership; Story on Partnership; Collyer on Partnership.

An agreement between firms whereby one furnishes the money and the other does the work, does not constitute a co-partnership: Clark v. Barnes, Iowa Sup. Ct., 12th Oct., 1887. Broom's Com. Law, 7th Ed., 1095, and pages cited; L. R. Digest, 1880, 2705-2733; L. R. Digest, 1885, 1016-1019; Emden's Digests.

Payment.—Sinclair's D. C. Act, 1879, 69; 5 Mews' Digest, 1115-1169; R. & J., 114, 2715-2727; Ont. Digest, 1884, 588-590; Ont. Digest, 1887, 518-524; Add. on Con., 8th Ed., 1433, 1434, and pages cited; Danforth's (U. S.) Digest, 830-832; Munger on Applications of Payment (U. S.); Broom's Com. Law, 7th Ed., 1093, 1096, and pages cited; Taylor on Ev., 8th Ed., 1739, and pages cited; Smith's Master and Servant, 137, 163, 209, 280, 392; Blackburn on Sale, title "Payment"; Benjamin on Sales, title "Payment"; L. R. Digest, 1880, 2769-2777; L. R. Digest, 1885, 1050; Roscoe's N. P. Ev., title "Payment."

Penal Actions.—R. & J., 2739; Ont. Digest, 1884, 590; Ont. Digest, 1887,

524; 5 Mews' Digest, 1182; Broom's Com. Law, 7th Ed., 1096, and pages cited; L. R. Digest, 1880, 2782-2786; L. R. Digest, 1885, 1051-1053; Add. on Torts, title "Penalties"; Pollock on Torts, "Penal Action."

When to be brought: Taylor on Ev., 8th Ed., 97, 98.

Liquidated damages and penalty: Taylor on Ev., 8th Ed., 62, 1242-1249; Smith's Master and Servant, 123, 127, 311, 312; Chitty on Con., title "Penalty"; Brownie on Carriers, 242, 253; Maxwell on Stat., title "Penalty"; R. S. O., 7, 264, 459, 555, 707, 809, 812, 867.

Penalty by Contract.—R. & J., 2742; Ont. Digest, 1884, 591; Ont. Digest, 1887, 524; 5 Mews' Digest, 1182; see next preceding note; see under By-law, 4 C. P. D., 118.

Persons Killed by Accident; Compensation.—R. S. O., 1266, 1294-1303, 2205, 1675, 2325; Add. on Torts; Pollock on Torts.

Petty Trespass.—R. & J., 2750; R. S. C., 1968; R. S. O., 915; 7 Mews' Digest, 101.

Pound-keeper.—R. & J., 2866; Ont. Digest, 1884, 209, 627; Ont. Digest, 1887, 316; R. S. O., 2341-2344; 8 Ont. R., 625; L. R. Digest, 1880, 2869; L. R. Digest, 1885, 1078; Woodfall's L. & T., title "Pound"; 8 Ont., 625.

Principal and Agent.—R. & J., 2991-3026; Ont. Digest, 1884, 643; Ont. Digest, 1887, 560; 6 Mews' Digest, 1; Broom's Com. Law, 1019, 1099 and pages there cited, 388; Addison, Chitty, Pollock, Leake, Parsons (U. S.) and Anson on Contracts; L. R. Digest, 1880, 3336-3360; L. R. Digest, 1885, 1260; Story (U. S.) on Agency; Thompson (U. S.) on Agents of Corporations; Wharton (U. S.) on Agency; Campbell on Agency; 2 Smith's L. C., title "Principal and Agent"; Emden's Digests.

Principal and Surety.—R. & J., 3062; Ont. Digest, 1884, 651; Ont. Digest, 1887, 563; 6 Mews' Digest, 101; Broom's Com. Law, 7th Ed., 1100 and pages cited; L. R. Digest, 1880, 3360-3381; L. R. Digest, 1885, 1261-1265; see also works on Contracts in next preceding note; 1 Smith's L. C., title "Principal and Surety"; Emden's Digests.

Prohibition.—R. & J., 3064; Shortt on Mandamus and Prohibition; Ont. Digest, 1884, 214, 259, and the pages of this work under that head; Ont. Digest, 1887, 560, 198; 6 Mews' Digest, 259; Broom's Com. Law, 7th Ed., 1101, and pages cited; see the notes to Sections 69 and 70; Emden's Digests; 33 Alb. L. J., 393, 396.

Public Officers.—Ont. Digest, 1884, 510; Ont. Digest, 1887, 477, 570; 6 Mews' Digest, 273; R. S. O., 700, 6, 199, 228, 480, 489, 226-235.

Public Schools.—R. & J., 8036. See Public and Separate School Acts; R. S. O. Index, lxxxv-lxxxviii; Ont. Digest, 1884, 660; Ont. Digest, 1887, 570; 6 Mews' Digest, 1002; R. S. O., 2466-2494.

Railways and Railway Companies.—R. & J., 3106; See also Dominion and Provincial Railway Acts; Ont. Diger' 1884, 668; Ont. Digest, 1887, 573; 6 Mews' Digest, 316-395; Broom's Com. Law, 7th Ed., 1104, and pages cited;

Hutchinson (U. S.) Lawson (U. S.) Redfield (U. S.) Thompson (U. S.) Wood, (U. S.) Goodeve, Rorer (U. S.) Browne and Theobald each on Railways and Public Carriers; R. S. O. Index, xc-xcii; R. S. C. Index, 108-112; L. R. Digest, 1880, 3437-3498; L. R. Digest, 1885, 1281-1296.

Release.—R. & J., 3288; Ont. Digest, 1884, 702; Ont. Digest, 1887, 600; 6 Mews' Digest, 557-576; Broom's Com. Law, 7th Ed., 152; Add. on Con., 1443, and pages cited; See other works on Contracts; Taylor on Ev., 8th Ed., 654, 659, 660.

Replevin and Replevin Bond.—See notes to Section 72; 2 Mews' Digest, 1451; 6 Mews' Digest, 583; Broom's Com. Law, 7th Ed., 1108, and pages cited; Sinclair's D. C. Act, 1879, 66. In addition to the works cited in the last book, see 6 Mews' Digest, 585-596; R. & J., 3296, 3310-3316, 4702; Ont. Digest, 1884, 704-706; Ont. Digest, 1887, 601, 602; Norman v. Hope, 13 Ont. R., 556; Add. on Con., 8th Ed., 1269; Replevin Act, R. S. O., 691, 692; also, pp. 506, 555, 602, 882; 44 U. C. R., 187, 261, 346; 5 Ex. D., 91; L. R., 8 C. P., 647; 12 Ch. D., 256; 30 C. P., 233, 255; 11 Ch. D., 198; 15 L. J. N. S., 205; 14 Ch. D., 179; 45 U. C. R., 86, 205; 22 Grant, 515; 5 App. R., 164, 596; 32 C. P., 158; 4 U. C. R., 398; Mayne on Damages, title "Replevin Bond;" Woodfall's L. & T., title "Replevin Bond."

Revivor.—R. & J., 3455; Ont. Digest, 1884, 727; Ont. Digest, 1887, 627; 6 Mews' Digest, 762; Sinclair's D. C. Law, 1879, 398, and pages cited.

Reward.—Sinclair's D. C. Act, 1879, 66; Add. on Con., 6, 385; 6 Mews' Digest, 762-705; Bent v. Wakefield Bank, 4 C. P. D., 1; England v. Davidson, 11 A. & E., 856; R. & J., 3327; 7 P. R., 239; L. R. Digest, 1880, 3633; Taylor on Ev., 8th Ed., 1069-1073.

Rules and Orders of the O. J. Act.—Ont. Digest, 1884, 707; Ont. Digest, 1887, 603. See New Rules.

Sale of Goods.—R. & J., 3331; Ont. Digest, 1884, 711; Ont. Digest, 1887, 607; 6 Mews' Digest, 766; Broom's Com. Law, 7th Ed., 1110 and pages cited; Benjamin on Sales; Blackburn on Sale, title "Sale;" Danforth's (U. S.) Digest, 942-948; L. R. Digest, 1880, 3666-3701; L. R. Digest, 1885, 1362-1366; Add. and other works on Contracts; 19 Q. B. D., 314, 322; 18 Q. B. D., 598; Emden's Digests.

Sample.—Blackburn on Sale; Benjamin on Sales, title "Sample;" Add. on Con., 8th Ed., 978; L. R. Digest, 1880, 3702; 6 Q. B. D., 17; 9 Q. B. D., 172; R. & J., 3440.

Seal.—R. & J., 3460; Notes to Section 6; Ont. Digest, 1884, 727; Ont. Digest, 1887, 629; 37 Alb. L. J., 68.

Seduction.—R. & J., 3464; Ont. Digest, 1884, 728; Ont. Digest, 1887, 629; 6 Mews' Digest, 1041; R. S. O., 469, 505, 554, 874, 884, 776; Broom's Com. Law, 7th Ed., 1111, and pages cited; see also notes to Section 69, title "Seduction;" Adultery, R. S. O., 711, 1277; see p. 77.

Set-off.—R. & J., 3492, 4709; Ont. Digest, 1884, 731; Ont. Digest, 1887, 634; 6 Mews' Digest, 1042; Broom's Com. Law, 7th Ed., 69; Waterman (U. S.)

2nd Ed., on Set-off, Recoupment and Counter-claim; L. R. Digest, 1880, 3785-3790; L. R. Digest, 1885, 1413-1415; Danforth's (U. S.) Digest, 958-961; Bullen & Leake's Prec., title "Set-off;" Sinclair's D. C. Act, 1879, 399, 400, and pages cited; Smith's Master and Servant, 187, 208; Arch. Pract.; Lush's Pract., title "Set-off."

The difference between Set-off and Counter-claim must always be kept in view: Sinclair's D. C. Law, 1884, 183, *et seq.*

Sheep.—R. & J., 3508; R. S. O., Chap. 214; Broom's Com. Law, 7th Ed., 712; see "Animals," *ante*; Taylor on Ev., 8th Ed., 147, 283; Blackburn on Sale, 23, 197, 494.

Sheriff.—R. & J., 3509, 4710; Ont. Digest, 1884, 731; Ont. Digest, 1887, 636; 6 Mews' Digest, 1096; Broom's Com. Law, 7th Ed., 1112, and pages cited; Taylor on Ev., 8th Ed., title "Sheriff;" Smith's Master and Servant, 306, 423; Danforth's (U. S.) Digest, 961, 962; L. R. Digest, 1880, 3867-3872; L. R. Digest, 1885, 1473, 1474; Pollock on Torts; Smith on Negligence, title "Sheriff;" Atkinson, Churchill and Watson on Sheriff.

Ship.—R. & J., 3566; Ont. Digest, 1884, 734; Ont. Digest, 1887, 638; 6 Mews' Digest, 1167; Broom's Com. Law, 7th Ed., 1113, and pages cited; L. R. Digest, 1880, 3872-4021; L. R. Digest, 1885, 1475-1520; Abbott on Shipping; Newson's Digest of Shipping; Parsons (U. S.) on Shipping.

Snow.—R. & J., 3601; Ont. Digest, 1887, 642; R. S. O., 1943, 1945, 1962; 6 Ont. R., 455; 12 App. R., 637.

Solicitors' Bill of Costs.—Sinclair's D. C. Act, 1879, 65, and authorities there cited; 6 Mews' Digest, 1878-1928; R. & J., 322-338, 4254-4260; Ont. Digest, 1884, 38-48; Ont. Digest, 1837, 643-652.

If Bill of Costs has not been rendered one month before action brought for its recovery, it is matter of defence only: 7 U. C. L. J., 135, 136; Scane *v.* Duckett, 3 Ont. R., 370.

Where there is negligence of a Solicitor: See *Whiteman v. Hawkins*, 4 C. P. D., 13.

The Taxing Master in taxing a Bill of Costs between a Solicitor and client has power to disallow the costs of proceedings in an action conducted by the Solicitor, which were occasioned by the negligence or ignorance of the Solicitor. But if the negligence goes to the loss of the whole action, he ought not to disallow them; but leave the client to bring an action for negligence against the Solicitor: *In re Massey v. Carey*, 26 Ch. D., 459; See *Duffett v. McEvoy*, 10 App. Cas., 800; Lush's Pract., 202-308; Add. on Con., 8th Ed., 407-411, 475, 1166, 1046; Arch. Pract.; Lush's Pract., title "Attorney," "Solicitor"; Gray on Costs, and page 88, *ante*.

Statutes.—R. & J., 3654; Ont. Digest, 1884, 744; Ont. Digest, 1887, 660; 6 Mews' Digest, 2004; Maxwell on Statutes; Danforth's (U. S.) Digest, 993, 1002.

Statutory Duty and Negligence.—7 H. & N., 937; 9 Ex., 223; 6 Ex., 460; 5 E. & B., 849; See J. Ex., 135; 10 App. R., 191; 10 Ont. R., 745; 13 App. R., 184; 8 App. Cas. 1166; 13 Q. B. D., 259; 12 App. R., 48; 3 App. R., 206; 11 Q. B. D., 203; 12 Q. B. D., 493; 1 H. & C., 633; Smith on Negligence, 158; 12 Q. B., 439; L. R., 9 Ex., 160; *Moxley v. Can. Atlantic*

Ry. Co., 14 App. R. (not yet reported); 14 App. R., 91. See "Negligence," *ante*, page 107.

Stolen Goods.—R. & J., 3676; Ont. Digest, 1884, 745; Weekly Notes, 1887, 244; R. v. Justices of Cen. Crim. Court, 18 Q. B. D., 314. See Criminal Law, "Larceny"; R. S. C. Chap., 164; 2 Mews' Digest, 1886-1886.

Stoppage in Transitu.—Smith's Mercantile Law; 6 Mews' Digest, 957-980, 2095; R. & J., 3364, 4705; Ont. Digest, 1887, 616; Add. on Con., 8th Ed., 1456, and pages there cited; Sinclair's D. C. Act, 1879, 69; Ont. Digest, 1887, 616; Broom's Com. Law, 7th Ed., 499; Blackburn on Sale; Benjamin on Sales, title "Stoppage in transitu." See other works on Contracts and Carriers, title "Stoppage in transitu"; 19 Q. B. D., 553.

Street Railways.—R. & J., 3677; Ont. Digest, 1887, 663; Danforth's (U. S.) Digest, 900-912.

Sunday.—R. & J., 3672; 1 American Law Review, N. S., 249 Ont. Digest, 1884, 746; Ont. Digest, 1887, 663; 6 Mews' Digest, 2096; 37 Alb. L. J., 58; L. R. Digest, 1880, 4126-4128; L. R. Digest, 1885, 1555. See "Lord's Day," *ante*, page 105; 5 New Eng. Rep., 401, 118, 258; 11 West. Rep., 549.

Taverns and Shops.—R. & J., 3702, 4715; Ont. Digest, 1884, 752; Ont. Digest, 1887, 357; 4 Mews' Digest, 523; 36 Alb. L. J., 354. See pages *ante* 68-71; R. S. O., 366-370, 2160-2217, 1917, 553, 814.

Telegraph and Telephone.—R. & J., 3722; Ont. Digest, 1887, 39, 668; 7 Mews' Digest, 2; Danforth's (U. S.) Digest, 1103; 34 Alb. L. J., 259, 504, 239; 35 Alb. L. J., 203, 303, 459, 4, 271; 36 Alb. L. J., 124, 311, 384; R. S. O., 561, 1568, 1465, 1466.

Tender.—R. & J., 3733; Ont. Digest, 1887, 668; 7 Mews' Digest, 11; Broom's Com. Law, 7th Ed., 163; Taylor on Ev., title "Tender"; Bullen & Leake's Prec. in Pleading; Add. on Con., and all other works on Contracts, title "Tender"; Section 122 hereto; Sinclair's D. C. Act, 1879, 404, and pages cited; R. S. O., 796, 1859, 1888, 606.

Timber.—R. & J., 3740; Ont. Digest, 1887, 669; Ont. Digest, 1884, 758; 7 Mews' Digest, 37; R. S. O. Index, cvii.; L. R. Digest, 1880, 4156; L. R. Digest, 1885, 1567; 13 Ont. R., 546; 12 Ont. R., 633; 13 App. R., 69.

Time.—R. & J., 3749; Ont. Digest, 1884, 759; Ont. Digest, 1887, 671; 7 Mews' Digest, 40; Broom's Com. Law, 7th Ed., 261, 404; L. R. Digest, 1880, 4156-4159; R. R. Digest, 1885, 1568; Sinclair's D. C. Act, 1879, 404, and pages cited.

Tolls.—R. S. O., 553, 874, 1165, 1177, 2230: See *ante*, page 73.

Trespass.—R. & J., 3759; Ont. Digest, 1884, 761; Joint Liability of Husband and Wife, see *Barker v. Westover*, 5 Ont. R., 116; Ont. Digest, 1887, 676; 7 Mews' Digest, 101; Broom's Com. Law, 7th Ed., 1123, and cases cited; Add. on Torts; R. S. O. Index, cviii.; L. R. Digest, 1880, 4197; L. R. Digest, 1885, 1587, 1588.

Trial.—R. & J., 3802; Ont. Digest, 1884, 763; Ont. Digest, 1887, 678; 7 Mews' Digest, 143; Broom's Com. Law, 7th Ed., 1124, and pages cited; L. R. Digest, 1880, 4198; L. R. Digest, 1885, 1588.

Trover.—R. & J., 3826; the pages of this work on that subject; 7 Mews' Digest, 144; Ont. Digest, 1884, 767; Broom's Com. Law, 7th Ed., 234; Add. on Torts; Pollock on Torts and other similar works, title "Conversion."

Use and Occupation.—R. & J., 3890; Ont. Digest, 1887, 696; 7 Mews' Digest, 263; Woodfall's L. & T.; L. R. Digest, 1880, 4260; L. R. Digest, 1885, 1616.

Valuator.—Ont. Digest, 1884, 774; 7 Mews' Digest, 270; L. R. Digest, 1880, 4269-4272; L. R. Digest, 1885, 1618, 1619.

Verdict.—R. & J., 3904; Ont. Digest, 1884, 776; Ont. Digest, 1887, 698; 7 Mews' Digest, 452; Broom's Com. Law, 7th Ed., 1126, and pages cited; L. R. Digest, 1880, 4339; L. R. Digest, 1885, 1645; Arch. Pract.; Lush's Pract.; MacLennan's Jud. Act, title "Verdict."

Voluntary Conveyance.—R. & J., 3912; May on Fraudulent Conveyances; Ont. Digest, 1884, 777; Ont. Digest, 1887, 698; 7 Mews' Digest, 453; Broom's Com. Law, 7th Ed., 294, 295; Millar's Bills of Sale, 366, 367, and pages noted. See "Fraudulent Conveyance," *ante*, 93.

Waiver.—R. & J., 3916; Ont. Digest, 1884, 778; Ont. Digest, 1887, 699; 7 Mews' Digest, 454; Broom's Com. Law, 7th Ed., 598, 793; L. R. Digest, 1880, 4358; L. R. Digest, 1885, 1651.

Warranty.—Sinclair's D. C. Act, 1879, 66; Add. on Con., 1463, 1464, and pages there cited; R. & J., 3923-3930; 7 Mews' Digest, 504; 8 Mews' Digest, 2153-2169; 6 Mews' Digest, 853-890, 915-938; De Colyar on Guarantees, 2nd Ed., 1, 2; Ont. Digest, 1884, 779, 780, 351-383; Ont. Digest, 1887, 700-702.

As to implied warranty of title on sale: See *Donaldson v. Smith*, 15 L. J. N. S., 206; *Bain v. Fothergill*, L. R., 8 H. L., 158, 211; *Ellis v. Abell*, 10 App. R., 226.

Warranty in horse sale; "all right" means "sound": 49 Conn., 462.

Warranty cannot be added to written contract of sale by parol evidence: 58 Iowa, 579; Broom's Com. Law, 7th Ed., 1127, and pages cited; Add. on Con., and other works on same subject.

Warranty of Horses.—Sinclair's D. C. Act, 1879, 67-69; see "Warranty," *supra*.

A remark that a horse is "all right" means that he is warranted "sound." Shying does not include blindness in part: 49 Conn., 462. A warranty cannot be added to a written contract of sale by parol evidence: 58 Iowa, 579; Taylor on Ev., 8th Ed., 1735, 1736. This does not apply to a distinct agreement between the parties: Taylor on Ev., 966; *Morgan v. Griffith*, L. R. 6 Ex., 70; *Angell v. Duke*, L. R., 10 Q. B., 174; *Erskine v. Adeane*, L. R., 8 Ch., 756; *Oliphant on Horses*; see note, "Horse," *ante* p. 95.

Will.—R. & J., 4502; Ont. Digest, 1884, 794.

Judge
may order
payment
in money,
although
contract
not for
payment
in money.

§ 1. (s) Upon any contract for the payment of a sum certain in labour or in any kind of goods or commodities or in any other manner than in money, the Judge, after the day has passed on which the goods or commodities ought to have been delivered or the labour or other thing performed, may give judgment for the amount in money as if the contract had been originally so expressed. R. S. O. 1877, c. 47, s. 55.

Agreement to make a will in favor of a certain person; 36 Alb. L. J., 357; Ont. Digest, 1887, 723; L. R. Digest, 1880, 4393-4584; 7 Mews' Digest, 800; L. R. Digest, 1885, 1663-1703; Jarman, Hawkins (U. S.), Redfield (U. S.) Theobald and Walkem on Wills; O'Sullivan on Conveyancing; R. S. O., 454, 505, 553, 988, 990.

Winding-up Act.—R. S. O., 1730-1742. R. S. C., Chap. 129; 2 Mews' Digest, 616-814.

Witness.—Sinclair's D. C. Act, 1879, 66; 3 Mews' Digest, 1395-1413; R. & J., 1309-1312; L. R. Digest, 1880, 4586-4588; L. R. Digest, 1885, 1710, 1711, Ont. Digest, 1884, 246, 247; Ont. Digest, 1887, 141-143; Broom's Com. Law, 7th Ed., 1128, and pages cited.

Witnesses (Crown).—R. S. O., 814, 858, 1885.

Words and Phrases.—R. & J., 4145-4152, 4735, 4736; Ont. Digest, 1884, 817-820; Ont. Digest, 1887, 755-759; L. R. Digest, 1880, 4589-4614; Browne on Common Words and Phrases; Broom's Com. Law, 7th Ed., 936, 937.

Work, Labour and Materials.—Sinclair's D. C. Act, 1879, 64; Add. on Con., 8th Ed., 1466, 1467, and the pages there referred to; 7 Mews' Digest, 1055-1099; R. & J., 4152-4187; The Barrie Gas Co. v. Sullivan, 5 App. R., 110; Ont. Digest, 1884, 820-822; Ont. Digest, 1887, 759-761; Taylor on Ev., 8th Ed., 895; Chitty on Contracts, and other works on the same subject; L. R. Digest, 1880, 4614, 4615; L. R. Digest, 1885, 1720; 3 Burr., 1592.

Workmen's Compensation for Injuries.—R. S. O., Chap. 141; Broom's Com. Law, 1058, and cases cited; Pearce v. Foster, 53 L. T. N. S., 867; Grizzle v. Frost, 3 F. & F., 622; Rudd v. Bell, 13 Ont. R., 47; Heske v. Samuelson, 12 Q. B. D., 30; Cripps v. Judge, 13 Q. B. D., 583; Weblin v. Ballard, 17 Q. B. D., 122; Paley v. Garnett, 16 Q. B. D., 52; Stuart v. Evans, 49 L. T. N. S., 138; Thomas v. Quartermaine, 18 Q. B. D., 685; Baddeley v. Granville (Earl), 19 Q. B. D., 423; Yarmouth v. France, 19 Q. B. D., 647; Cox v. Hamilton Sewer Pipe Co., 14 Ont. R., 300; Dean v. Cotton Mills Co., (to be reported in 14 Ont. R.); 36 Alb. L. J., 358; 5 Mews' Digest 204, 275; 35 Alb. L. J., 450-454.

(s) Sinclair's D. C. Act, 1879, 69-76.

The law on such subjects is very fully expressed in Roberts v. Smith, 34 Alb. L. J., 76, as follows:

72. (t) The Division Courts shall also have jurisdiction in all actions of replevin, where the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of \$60, as provided in *The Replevin Act*. R. S. O. 1877, c. 47, s. 56; 43 V. c. 8, s. 3.

Jurisdiction in replevin.

Rev. Stat. c. 55.

"The following writing, 'Two years from date, for value received, I promise to pay J. S. King, or bearer, one ounce of gold,' is not a negotiable note, but a simple contract for the delivery of merchandise. Although it has long been settled in this State that a written contract having the usual form of a promissory note, but payable in some specific article, may be treated as a promissory note as to the form of declaring upon it, and the necessity of proof of consideration, and in some other respects (Rob. Dig. 92), yet such an instrument is not negotiable, because not payable in money. *Collins v. Lincoln*, 11 Vt. 268; 1 Dan. Neg. Inst. 42. The instrument declared upon was not even a promise to pay a given sum in specific articles. It stands, for consideration, upon the question of the sufficiency of the declaration, under the demurrer thereto, as though it were a promise to pay one bushel of wheat. It is but a promise to pay, that is, deliver, a certain article of merchandise definite in amount. Because gold enters into the composition of money we cannot assume that 'an ounce of gold' is money, or that it has a fixed and unvarying value. The contract in question lacks, not only the quality of negotiability, but certainty and precision as to the amount to be paid. Upon failure to perform, there would be no definite specified sum due, as in case of a promissory note."

It will be seen that though suable as a promissory note, yet it could not be transferred as such. The change in the law effected by this Section does not alter the character of the instrument, but only the remedy upon it. It would not partake of the character of a promissory note, but the Section only gives the same remedy on the paper after default that would have existed if it had been a note. We see no reason why it could not be assigned as an ordinary Chose in Action.

(t) *Sinclair's D. C. Act*, 1879, 69.

It will be observed that the increased jurisdiction is extended to actions of Replevin in Division Courts. Formerly, the action of Replevin could not be brought in the Division Court if the value of the property was more than \$40. Now, it is extended to \$60. In other respects we think the rights of the parties is the same, except that in certain cases a right of appeal is given. The right of Replevin in County Courts will be found to exist by R. S. O., 506, and in the Division Courts, at pages 555, 602, and in Territorial Districts, 882.

The following is the Replevin Act as it at present appears in R. S. O., Chap. 55. It will be observed that the part relative to "Procedure" has been omitted from our present Revised Statutes. It will be found probably in the New Rules being prepared.

"An Act respecting Actions of Replevin."

"HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

"1. This Act may be cited as "*The Replevin Act*." R. S. O. 1877, c. 53, s. 1.

WHEN GOODS REPLEVIABLE.

"2. Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects have been wrongfully distrained under circumstances in which by the law of England, on the 5th day of December, 1859, replevin might have been made, the person complaining of such distress as unlawful may bring an action of Replevin, or where such goods, chattels, property or effects have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of Replevin for the recovery of the goods, chattels, property or effects, and for the recovery of the damages sustained by reason of the unlawful caption and detention, or of the unlawful detention, in like manner, as actions are brought and maintained by persons complaining of unlawful distresses. R. S. O. 1877, c. 53, s. 2.

"3. No party to an action or proceeding, in any Court, shall replevy or take out of the custody of the Sheriff, Bailiff, or other officer, any personal property seized by him under process against such party. R. S. O. 1877, c. 53, s. 3.

REPLEVIN IN COUNTY COURTS.

"4. In case the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of \$200, and in case the title to land is not brought in question, the action may be brought in the County Court of any County wherein the goods or other property or effects have been distrained, taken or detained. R. S. O. 1877, c. 53, s. 4.

REPLEVIN IN DIVISION COURTS.

"5.—(1) In case the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of \$60, and in case the title to land is not brought in question, the action may be brought in the Division Court for the Division within which the defendant or one of the defendants resides or carries on business, or where the goods or other property or effects have been distrained, taken or detained. See *Cap.* 51, s. 72.

"(2) The matter shall then be disposed of without formal pleadings, and the powers of the Courts and officers, and the proceedings generally shall be, as nearly as may be, the same as in other cases which are within the jurisdiction of Division Courts. R. S. O., 1887, c. 53, s. 5."

In addition to what has been said on this subject at pages 56, 69-76 of Sinclair's D. C. Act, 1879, we have to add the following: Where there has been a sale of property to an innocent purchaser, against whose vendor the action of Replevin has been brought, a Bailiff cannot justify the taking of the property out of the possession of the innocent purchaser, even if there may have been fraud in the original transaction: *Stoesser v. Springer*, 7 App. R., 497; *McGregor v. McNeil*, 32 C. P., 538; *Hoorigan v. Driscoll*, 8 P. R., 184.

Where timber was cut under a license from the Crown upon land which was supposed to be covered by the license but was not, the Court exercised its equitable jurisdiction and stayed an action on the Replevin Bond upon certain terms: *Bates v. Mackey*, 1 Ont. R., 34.

Where one party wrongfully intermingles his property with that of another, all the party whose property is intermingled can require is that he should be permitted to take from the whole an equivalent in number and quality for that which he originally possessed: *McDonald v. Lane*, 7 Sup. R. 462; *McGregor v. McNeil*, 32 C. P., 538; *The G. W. Ry. Co. v. Hodgson*, 44 U. C. R., 187.

In *Hoorigan v. Driscoll*, 8 P. R. 184, it was held that goods could not be

seized under a Writ of Replevin while they were in the possession of a party not named therein, but the plaintiff was allowed to amend the description in that respect.

As to how far actions of Replevin are within the O. J. Act: See *Campan v. Lucas*, 9 P. R., 142; *Wallace v. Cowan*, 9 P. R., 144; *Bradley v. Clarke*, 9 P. R., 410.

Where a Bailiff seizes goods under a Replevin and does not take the necessary bond, the seizure will be set aside with costs to be paid by the Bailiff: *Lawless v. Radford*, 9 P. R., 33. See *Bates v. Mackey*, 1 Ont. R., 34.

Sheep which were impounded were grazing upon an open common with the consent of the owner thereof, and were being herded by a boy in charge of them with a view of driving them home, when they were taken possession of by two constables against the boy's remonstrance. *Held*, that the sheep were not running at large in contravention of a By-law of the Municipality on the subject, and that the constables were liable in Replevin for impounding them. It was held, also, that Replevin would not lie against a pound-keeper: *Ibbittson v. Henry*, 8 Ont. R., 625. It was also held in that case that the constables were not entitled to notice of action.

Where Replevin is brought for rent alleged to be due, the landlord must justify the seizure for rent due for the premises on which the seizure was made: *Robins v. Coffee*, 9 Ont. R., 332.

In an action of Replevin brought in the County Court of Haldimand for a mare taken by the defendants from the defendants' place in that County, removed to the County of Brant, and there detained until replevied—*Held*, that the taking could not be justified under a warrant issued for the arrest of the plaintiff on the charge of stealing the mare, and although the original taking was justified under a search warrant issued to search the plaintiff's premises in Haldimand for the mare, and to bring it before a Justice of the Peace for that County, yet the subsequent removal to the County of Brant and the detention there were not justified, and constituted the defendant a trespasser *ab initio*, and therefore the County Court of Haldimand had jurisdiction to replevy the goods in Brant: *Hoover v. Craig*, 12 App. R., 72.

Where the avowant successfully defended a Replevin Suit and subsequently instituted proceedings on the Replevin Bond, it was held, he was not entitled to recover, as part of his damages, the excess of solicitor and client costs of his defence over and above his taxed party and party costs in that action; *Williams v. Crow*, 10 App. R., 301. The costs in this Province in cases of Replevin for rent are, by Statute, made similar to the law of England in that respect: *Williams v. Crow*, 10 App. R., 301; *Schaffer v. Dumble*, 5 Ont. R., 716.

An action would lie against a Bailiff for taking an insufficient bond in Replevin: *Norman v. Hope*, 13 Ont. R., 556, but the amount of the damages could not exceed the penalty of the bond. *Idem*.

A Replevin Bond taken in a Division Court suit can be sued in that Court no matter what the penalty of the bond may be: See Section 207; but judgment cannot be for an amount beyond the penalty of the bond: Section 266; *Exchange Bank v. Springer*, 13 App. R., 390.

The right of trial by jury is now extended to actions of Replevin where the value of the goods, sought to be recovered, exceeds \$20: See Section 154; *Sinclair's D. C. Act*, 1880, §69.

The jurisdiction in actions of Replevin has now been extended where the property in dispute does not exceed, in full, the sum of \$60: See Section 72; *Sinclair's D. C. Act*, 1880, 12.

On the general subject of Replevin see *Sinclair's D. C. Law*, 1885, 308-312,

Powers of
Courts.

73. (u) Every Division Court shall as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such court such relief, redress, or remedy, or combination of remedies, either absolute or conditional, including the power to relieve against penalties, forfeitures and agreements for liquidated damages, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court. 44 V. c. 5, s. 77; 49 V. c. 16, s. 38.

and the pages of that work there referred to; also, Sinclair's D. C. Act, 1886, 103, 115, 116.

As to the damages which now may be given in actions of Replevin and on Replevin Bonds, see Mayne on Damages, 3rd Ed., 372-374, 406-409, 501; Morris on Replevin, 3rd Ed.; R. & J., 3314, 4702; Ont. Digest, 1884, 706, and note *ante*, page 110, "Replevin and Replevin Bond."

A boarding-house keeper has not any lien on other people's property in possession of his boarder and cannot resist an action of Replevin therefor: Newcombe v. Anderson, 11 Ont. R., 665.

On the subject of Replevin generally, see the different parts of this work, under the title "Replevin" and "Replevin Bond," and especially Sinclair's D. C. Act, 1879, 69-76; D. C. Act, 1880, 12, 69; D. C. Law, 1885, 308-312; D. C. Act, 1886, 103, 115, 116.

(u) This will be seen to be a combination of two Sections, giving and enlarging the power to Division Courts. The subject will be found discussed, so far as legislation then existed, at page 179 and the following pages of Sinclair's D. C. Law, 1884.

It will be observed that the Section is extensive in its operation, and whatever rights the High Court of Justice possesses in regard to matters within its jurisdiction, is possessed and shall be exercised in the same way by the Division Courts to its limited extent. Whatever redress, remedy or combination of remedies, either absolute or conditional, which exists in the High Court to relieve against penalties, forfeitures and agreements for liquidated damages or other matters within the jurisdiction of the High Court, is given to Division Courts by this Section, and the like effect to every ground of defence, Counter-claim, equitable or legal, which the High Court possesses shall be exercised in as full and ample a manner as could be done in the High Court, by the Division Court.

The subject of Counter-claim will be found discussed on pages 179-215 of Sinclair's D. C. Law, 1884.

74. (v) Where in any proceeding before a Division Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the court, such defence or counter-claim shall not affect the competence or the duty of the court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence there- to, but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counter-claim. 44 V. c. 5, s. 78.

Duty of Court where defence or counter-claim involves matter beyond jurisdiction.

[As to transfer of cases from the Division Court to the High Court. See chap. 44, s. 158.]

Where a Claim and Counter-claim arise out of different matters, so that the Counter-claim is really in the nature of a cross action, the defendant, if he is residing out of the jurisdiction, may be required to give security for the plaintiff's costs of the Counter-claim, and if the only dispute remaining arise on the Counter-claim it is only right that he should be so required: *Sykes v. Sacerdoti*, 15 Q. B. D., 423.

A Counter-claim need not arise out of the same subject as the cause of action. There can be a Counter-claim for an entirely different subject as between the parties to the action themselves: *Brown v. Nelson*, 11 P. R., 121; *McLean v. Hamilton St. Ry. Co.*, 11 P. R., 193. In some of the United States the law is not so: *Zigler v. McClellan*, Sup. Ct. Oregon, 19 Dec., 1887. Where the rights of third parties intervene it is different. The Court has a discretion to exclude a Counter-claim which may unduly delay the action: *Grey v. Webb*, 21 Ch. D., 802.

The subject of Liquidated Damages will be found discussed at another part of this work, with the authorities bearing upon the same there cited. See page 105.

(v) The jurisdiction of the Division Court being limited, it would, unless for this Section, necessarily be in many cases a matter beyond the jurisdiction of such Court to investigate the subject of Counter-claim, and the Legislature has very properly provided that where any defence or Counter-claim involves matters beyond such jurisdiction the hands of the Court shall not be stayed but may fully investigate such matters.

Before this provision a difficulty was experienced in regard to the ordinary garnishment process in Division Courts, as will be seen by reference to *Re Mead v. Creary*, 32 C. P., 1. No such difficulty here exists, and in matters of Counter-claim a Division Court has power to enquire therein, no matter what the amount involved may be, but in disposing of the matter in controversy the relief which the Court has power to grant shall not exceed the jurisdiction of the Court. On this subject see *Sinclair's D. C. Law*, 1884, 179-215; *Sinclair's D. C. Law*, 1885, 191-194; *Sinclair's D. C. Act*, 1886, 141; *Dushane v. Benedict*, 35 Alb. L. J., 406.

Where a Counter-claim involves matter beyond the jurisdiction of a Division

No privilege to exempt from jurisdiction of Court.

75. (w) No privilege shall be allowed to any person to exempt him from suing and being sued in a Division Court; and any executor or administrator may sue or be sued therein: and the judgment and execution shall be such as in like cases would be given or issued in the High Court. R. S. O. 1877, c. 47, s. 57.

Minors may sue for wages.

76. (x) A minor may sue in a Division Court for any sum not exceeding \$100 due to him for wages, in the same manner as if he were of full age. R. S. O. 1877, c. 47, s. 58.

Court, the cause of action may be transferred to the High Court of Justice under the provisions of Section 158 of Chap. 44 of the Revised Statutes of Ontario. That Section is in these words:

"In cases before any County or Division Court where the defence or Counter-claim of the defendant involves matter beyond the jurisdiction of the Court, the High Court or any Division or Judge thereof, may on the application of any party to the proceeding, order that the whole proceeding be transferred from such Court to the High Court, or to any Division thereof: and in such case the Record in such proceeding shall be transmitted by the Clerk or other proper officer, of the County or Division Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein. 44 V. c. 45, s. 76. (see Cap. 47, s. 22, and Cap. 51, s. 74)."

(w) See Sinclair's D. C. Act, 1879, 76.

It will be observed that under this Section no privilege is given to any person to exempt him from either suing or being sued in any Division Court. In addition to the authorities there cited, the reader is referred to *Jeffreys v. Beart*, 5 D. & L., 646; 2 *Mews' Digest*, 1446; *Day v. Ward*, 17 Q. B. D., 708.

(x) On this subject see Sinclair's D. C. Act, 1879, 76-78.

This is a special power given to minors. It will be seen in the pages referred to in the work just cited the right is not confined to minors to sue for wages only, but a minor cannot be a common informer: *Garrett v. Roberts*, 10 App. R., 650. Nor can he be appointed an administrator: *Merchants Bank v. Monteith*, 10 P. R., 334.

On the subject of the rights and liabilities of an infant the reader is referred to the various parts of this work under the title "Infant."

An important subject has lately arisen whether during illness a servant is entitled to wages during that time. The latest case on the subject is in favor of the proposition that he is, during illness, entitled to wages: 36 Alb. L. J., 399, and the late case in England of *Patten v. Wood*, not yet reported, but referred to at p. 400 of 36 Alb. L. J., is in favor of that view.

The subject of what are necessities for an infant has of late years received considerable discussion. In the case of *Barnes v. Toye*, 13 Q. B. D., 410, it was held that where an infant is sued for the price of goods supplied to him on credit he may, for the purpose of showing that they were not necessities, give evidence that when the order was given he was already sufficiently supplied

with goods of a similar description, and that it was immaterial whether the plaintiff did or did not know of the existing supply. So also in *Johnstone v. Marks*, 19 Q. B. D., 509, it was held that the infant might give evidence to show that at the time of the sale he was sufficiently provided with goods of the kind supplied. The case of *Ryder v. Wombwell*, L. R. 3 Ex. 90, was expressly dissented from, and may now be considered as overruled.

If an infant, or any other person who is a servant, is discovered in any gambling transaction, or in the nature thereof, may be dismissed by his master from his employment on discovering the same: *Pearce v. Foster*, 17 Q. B. D., 536.

As to contributory negligence on the part of an infant, see 34 Alb. L. J., 282.

Where goods are sold to a partnership, one of whom is an infant, see *Folds v. Allardt*, 34 Alb. L. J., 357.

It was held in *House v. Alexander* (Ind. Sup. Ct.) 33 Alb. L. J., 338, that an infant who had bought and paid for a horse, and subsequently tendered it back and demanded the money paid, was entitled to recover. This appears inconsistent with the English cases and the later American cases on the subject of necessities: see 35 Alb. L. J., 223.

It was held in *Rice v. Boyer*, 35 Alb. L. J., 345, that an infant was liable for deceit for an injury resulting by reason of fraudulent representation that he was of full age. It must be observed that the course of English authority has hitherto been the other way. In *Adams v. Beall*, 35 Alb. L. J., 382, it was held that where money had been paid by a minor in consideration of being admitted as a partner in business, and where he did become and remain a partner for a given time, that he could not recover back the money thus paid by him unless he was induced to enter into the partnership on fraudulent representations.

In support of the case of *Blake v. Shaw*, 10 U. C. R., 180, may be cited *Warburton v. Heyworth*, 6 Q. B. D., 1, to the effect that a servant who leaves his master's employment, without just cause, shall forfeit his wages not then due: *Barrie Gas Co. v. Sullivan*, 5 App. R., 110. See 3 Burr., 1692; 5 App. R. 115; L. R. 4, C. P., 330; L. R. 9 Q. B., 367; 1 H. & N., 266; 13 U. C. R., 205.

Proof of infancy in an action against an infant lies on the defendant: *Hartley v. Wharton*, 11 A. & E., 934.

A contract to serve for one year, the service to commence on the second day after that on which the contract is made, is a contract not to be performed within a year, within the 4th Section of the Statute of Frauds: *Britton v. Rossiter*, 11 Q. B. D., 123. It does not avoid the contract, but only bars the remedy: *Maddison v. Alderson*, 6 App. Cas., 474; *McManus v. Cooke*, 35 Ch. D., 681.

A suit by the servant against the master for debt, arising out of an independent transaction, is not a cause of a discharge of the servant from his service: *Clay Commercial Telephone Co. v. Root*, 33 Alb. L. J., 215.

As to actions by a servant against a master for negligence, see *Wanamaker v. Burke*, 33 Alb. L. J., 215; *Philadelphia & R. Co. v. Brannen*, 33 Alb. L. J., 215; *Rudd v. Bell*, 13 Ont. R., 47.

On the general rights and liabilities of infants (in addition to the cases cited), see 4 Mews' Digest, 497; Addison on Contracts, 448, 8th Ed.; Taylor on Ev., 8th Ed., 1694, and pages there cited; and the other pages of this work on "Infants."

Causes of
action not
to be
divided.

§ 77. (y) A cause of action shall not be divided into two or more actions for the purpose of bringing the same within the jurisdiction of a Division Court, and no greater sum than \$100 shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds \$400. R. S. O. 1877, c. 47, s. 59.

Judgment
to be full
dis-
charge.

§ 78. (z) A judgment of a Division Court upon an action brought for the balance of an account shall be a full discharge of all demands in respect of the account for the balance of which such action was brought, and the entry of judgment shall be made accordingly. R. S. O. 1877, c. 47, s. 60.

(y) On this subject, see Sinclair's D. C. Act, 1879, 79-81.

The object of this Section was to prevent plaintiffs from splitting up their causes of action for the purpose of suing them in the Division Court. The provision was made that no greater sum than \$100 should be recovered in any action in the Division Court for the balance of an unsettled account; nor should any action for such balance be sustained where the unsettled account in the whole should exceed \$400.

A great deal of learned discussion has taken place upon what is the meaning of "splitting a cause of action" and "unsettled account." We have simply to refer the reader, in addition to the work and pages we have cited, to the notes to Sections 69 and 70 upon these subjects, and other parts of this work, and 2 Mews' Digest, 1431.

(z) Sinclair's D. C. Act, 1879, 81.

The writer has been unable to find any later cases upon the subject of this Section than appear at the above page. It must be observed that it is not the *suing* in the Division Court for an amount within its jurisdiction after the plaintiff has abandoned the balance of his account for which his action is brought, that operates as a full discharge of all demands in respect of the account, but it is the "judgment" of the Court thereupon that has that effect. This is well illustrated in the judgment of Moss, C. J., in *Winger v. Sibbald*, 2 App. R., 610. Further, as to the effect of abandoning by a plaintiff of the excess of his claim, see 2 Mews' Digest, 1433. In such case the Judge should be particular to order that judgment be entered for the plaintiff as the Section directs, viz.: "in full discharge of his cause of action set forth in the claim": D. C. Form 51; Sinclair's D. C. Act, 1879, 802.

Under Rule 8 (D. C. Act, 1879, page 240) the excess must be abandoned in the first instance "on the claim." See also other parts of this work under "Splitting Demands" and "Abandoning Excess."

79. (a) In case the debt or damages claimed in an action brought in a Division Court amounts to \$40 and upwards, and in case it appears to any of the Judges of the High Court that the case is a fit one to be tried in the High Court, and in case a Judge thereof grants leave for that purpose, the action may by writ of *certiorari* be removed from the Division Court into the High Court upon such terms as to payment of costs or other terms as the Judge making the order thinks fit. R. S. O. 1877, c. 47, s. 61.

Causes may be removed by *certiorari* in certain cases.

(a) See Sinclair's D. C. Act, 1879, 81-84.

It is upon this Section which the right of *Certiorari* to the Division Courts exists. The reader is referred to the different parts of this work on that subject. The writer is of opinion that the amount of \$40 referred to in the Section only applies where the plaintiff's claim is to that amount. The defendant may put in a Set-off or Counter-claim to a much larger sum, but that does not give the right to *Certiorari*. It is the "debt or damages claimed" by the plaintiff that, we think, gives that right.

It will be observed that application may be made to any of the Judges of the High Court, and we think that, since the O. J. Act, a Division Court case may be removed to any Division of the High Court. Before that Act it was not the practice to remove cases to the Court of Chancery. *Certiorari* presupposes jurisdiction in the inferior Court.

Where a Division Court has not the jurisdiction to entertain or try a case, this Section will have no application: *Wiltsie v. Ward*, 8 App. R., 549.

A defendant cannot wait and take the chances of a decision in his favor, and, finding it adverse, apply for a Writ of *Certiorari*: *Knight v. Medora*, 11 Ont. R., 138. In Appeal: 14 App. R., 112, sustaining *Black v. Wesley*, 8 U. C. L. J., 277; *Gallagher v. Bathie*, 2 L. J. N. S., 73, and *Holmes v. Reeve*, 5 P. R., 58.

When proceedings in the Division Court have been removed by *Certiorari* into the High Court, a rule or order to set aside the proceedings by any such Court for irregularity should be made in the High Court. A suit was removed by *Certiorari* from a Division Court to one of the Superior Courts, upon its being shewn that a question of law as to the application of the Statute of Limitations would arise on the trial: *Ridley v. Tullock*, 3 U. C. L. J., 14. This case can only have application, we submit, where the Statute of Limitations cannot fairly be discussed or decided in the Division Court.

On the general subject, see 2 Mews' Digest, 4; Chitty's Forms, 13 Ed., 843 and pages cited; Arch. Pract. and Lush's Pract., title "*Certiorari*."

The form of *Certiorari* will be found in the New Rules. See also R. S. O., 556.

On the subject of *Certiorari* generally, see page 86 of this work.

PROCESS AND PROCEDURE.

Court
where
action
may be
tried to
have full
power.

80. (b) When it is by this Act provided that a claim may be entered, or an action brought, or that any person or persons may be sued in any Division Court or that an action may be transferred to any other court, such court shall have jurisdiction in the premises, and all proceedings may be had and taken both before and after judgment in or relating to such claim or cause as may now be had, and taken in or relating to any claim or cause which has been lawfully entered in the court holden for the division in which the cause of action arose, or in which the defendant or any one of several defendants resided or carried on business at the time the action was brought. *
43 V. c. 8, s. 12.

Division in which action to be entered.

In what
Court

81. (c) Any action cognizable in a Division

(b) See Sinclair's D. C. Act, 1880, 30.

This Section did not form part of the original Division Courts Act. It became necessary, when power was given to the Division Court, to transfer causes from one Court to another, and where new rights, powers and jurisdiction were conferred upon Division Courts, which they did not formerly possess. Now, any case which may not have been properly triable in one Division Court, but which may be transferred to another, under the provisions of the Act, shall possess the same effect and validity as if originally sued in the proper Court, and the Judge who adjudicates upon the same, and all officers of the Court, shall have the same rights, duties and powers as if the case had been properly entered there. The 87th Section alone gives the right to the Judge to transfer a cause to another Division Court. He can only do so legally in two cases: (1) If the cause has been entered in the wrong Division Court by "mistake;" (2) If so entered by "inadvertence." The former is defined by Worcester to be "A misconception; an error in opinion; misapprehension; misunderstanding; a slip; a blunder; a wrong act done unintentionally;" the latter as "inattention; negligence; carelessness; heedlessness; inconsiderateness; oversight; the effect of negligence or inattention." The transfer may be made to a Division Court of the same or any other County. A transfer under this Section is sometimes made by consent of the parties. This cannot properly be done. It is for the party applying for transfer to shew, to the satisfaction of the Judge, by proper legal evidence, that one or other of the cases required by the Statute is made out before he can order the transfer. Consent alone gives no right to transfer. Section 91 has no application.

(c) Sinclair's D. C. Act, 1879, 84-87.

The subject matter of this Section will be found fully dealt with in the pages

Court may be entered and tried in the court holden for the division in which the cause of action arose or in which the defendant or any one of several defendants resides or carries on business at the time the action is brought, notwithstanding that the defendant at such time resides in a county or division different from the one in which the cause of action arose. R. S. O. 1877, c. 47, s. 62.

actions
may be
entered
and tried.

of the work above referred to and in the notes to Sections 69 and 70 hereto. The meaning of the words "carries on business," has been the subject of much judicial discussion, and we have tried, in the work and Sections referred to, to give all the authorities in England and Ontario on that subject. The almost similar words in the American Bankrupt Act, "carried on business," will be found fully discussed in the work of Bump on Bankruptcy, (U. S.,) 8th Ed., at page 4 and subsequent pages. That learned author there says :

"The phrase 'carried on business' has been comparatively little considered or discussed. Business is a term of extensive import and indefinite meaning. In its broadest sense it includes nearly all the affairs in which an individual can be an actor. Indulgence in pleasure, participation in domestic enjoyment, and engagement in the offices of merely personal religion, may be exceptions, but the employment of means to secure or provide for these is business. The term, as used in the statute, is not, however, synonymous with employment or vocation. A minister may have a vocation, and an operative may have an employment, but neither a minister nor an operative can well be said to be in business. To bring himself within the terms of this phrase, the debtor must be engaged in something that is commonly denominated business. Thus, a person who merely has an office in the district, where he receives letters, and is engaged in winding up the affairs of an insolvent firm to which he belonged, does not carry on business. It is not sufficient, however, to be engaged in it; he must carry it on. Hence, a clerk, although engaged in business, can not apply in the district where he is employed. There is also a difference between *superintending business* and *carrying on business*. A person who superintends a business can not be said to carry on the business; for all his acts are, in fact and in contemplation of law, the acts of his principal. There is, moreover, another objection. If he merely superintends the business, he does not furnish the capital; and no one carries on a business unless he provides the money that is needed in it, or has an interest in it by contributing his labor. The capital may be borrowed, but it must stand in the debtor's name. From this it follows that the business which is carried on must be the debtor's *own* business, and not that of another. Such would seem to be the proper construction of the phrase. There are, however, two cases that apparently conflict with this view. In both the debtors had carried on business within the district for a long time, and had failed. After their failure, one had been employed as a clerk and the other as an agent to superintend business, and both had been so employed during the whole of the six months that preceded their application; yet it was held that their applications were properly filed. The court appears to have been influenced by the fact that they had always been engaged in business within the district. In one case, however, the debtor did receive a share of the profits of the business which he superintended, and hence might be considered to carry on the business, for a person may furnish labor as well as capital.

Actions may be brought and tried in the Court nearest to the defendant's residence.

82. (1) (d) Such action may be entered and tried and determined in the court the place of sitting whereof is the nearest to the residence of the defendant, and the action may be entered, tried and determined irrespective of the place where the cause of action arose, and notwithstanding that the defendant at the time resides in a county or division other than the county or division in which the Division Court is situate, and the action entered.

Service of summons in such cases.

(2) It shall be sufficient if the summons in such case be served by a bailiff of the court out of which it issues, in the manner provided in section 96 of this Act; and upon judgment recovered in any such action a writ of *fiery facias* against the goods and chattels of the

"The phrase 'carrying on business' looks to the scheme and purpose to which all the transactions tend, the design and object which the party has in view. In carrying on a business there are many affairs which are merely incidental, and which may be, and often are, transacted elsewhere than at the place where the business is located, and such transactions may be of such frequent and even daily occurrence as to require an agency of considerable duration. Such collateral or incidental transactions do not constitute the business of the debtor, nor are they a carrying on of business in the sense of the law."

The subject of where a defendant resides has also frequently been up for judicial interpretation. As remarked by COCKBURN, C. J., in *Wellington v. Whitechurch*, 4 B. & S., 106, the maxim "that a husband's domicile is where his wife lives, applies only where a man is generally in one place and occasionally elsewhere." That is the general rule, but in the interpretation of the meaning of these words every case must depend on its own circumstances.

Ordinarily, men are supposed to reside where their wives and families do, but this is not always correct. A man may reside in one place and his wife and family in another: *Cartwright v. Hinds*, 3 Ont. R., 384, 395, and cases cited; see also 2 Mews' Digest, 1425.

(d) Sinclair's D. C. Act, 1879, 81-88.

It will be observed that the place of sitting which is nearest to the residence of the defendant shall determine the right to bring an action under this Section. The residence of the Clerk or the place of holding his office will form no part of the consideration. As to what is the place of sitting see *Malcolm v. Malcolm*, 15 Grant, 13; *Moffatt v. The Carleton Place Board of Education*, 5 App. R., 197, 202.

A party may take advantage of this Section quite irrespective of the place where the cause of action arose and notwithstanding that the defendant

defendant, and all other writs, process and proceedings to enforce the payment of the judgment, may be issued to the bailiff of the court, and be executed and enforced by him in the county in which the defendant resides, as well as in the county in which the judgment was recovered. R. S. O. 1877, c. 47, s. 63.

Execu-
tion.

83. (e) In case a person desires to bring an action in a division other than as in the next preceding two sections mentioned, a County Judge may by special order authorize an action to be entered and tried in the court of any division in his county adjacent to the division in which the defendant or one of several defendants resides, whether such defendant resides in the county of the Judge granting the order or in an adjoining county. R. S. O. 1877, c. 47, s. 64.

When
actions
may be
brought
in other
than the
regular
Divisions.

resides in a County or Division other than the County or Division in which the Division Court is situate and the action is entered : Sub-section 2.

The distance is measured as the crow flies : Sinclair's D. C. Act, 1879, 88, and cases cited. But the contrary was held in *Shaw v. Cade*, 54 Texas, 307, where the word "nearest" did not necessarily mean by geometrical measurement, but the most convenient of access and nearest to the usual travelled route. *Browne on Common Words*, 273, 274.

The sub-section provides that it shall be sufficient if the summons in such case is served by the Bailiff of the Court out of which it issues, and upon judgment recovered the same proceedings may be had to enforce payment of the judgment as if the action had been brought in the County in which the defendant resided.

(e) Sinclair's D. C. Act, 1879, 89.

It will be seen that this Section is intended to give a special jurisdiction to bring an action in a particular Court on obtaining the order of a Judge. As will be seen from the Division Court Rule 123, the order is to be obtained from the Judge before whom the action is to be tried. The summons need not state on the face of it that it was issued by order of the Judge : *Waters v. Handley*, 6 D. & L., 88.

Whether the service of a summons from the Division Court is good is a matter peculiarly for the decision of the Judge : *Idem*.

As to the service on a corporation having its head office out of the Province, see Section 101.

Where defendant is a corporation the head office of which is not in Province.

84. (f) In every case where the defendant is a corporation not having its head office in the Province and the cause of action arose partly in one Division and partly in another, the plaintiff may bring his action in either Division. 50 V. c. 8, Sched.

Where money made payable out of the Province.

85. (g) Where the debt or money payable exceeds \$100, and is by the contract of the parties made payable at a place out of the Province of Ontario, the action may be brought thereon in any Division Court, subject, however, to the place of trial being changed upon the application of one or more of the defendants as provided by the next succeeding section. 43 V. c. 8, s. 9.

Place of trial.

86. (h) (1) Where the debt or money payable exceeds \$100, and is made payable by the contract of the parties at any place named therein, the action may be brought thereon in the court holden for the division in which the

(f) This Section was introduced as part of Division Court legislation during the session of 1887. It was intended to get over the difficulty of suing a corporation that had its head office out of the Province and where the cause of action arose directly within two Divisions in this Province. The summons may be served in the same way as an ordinary summons for service of a corporation that had its head office out of the Province; as to which see Section 101.

(g) Sinclair's D. C. Act, 1880, 26.

When the Division Court jurisdiction was increased by the Act of 1880, it was considered just, that a plaintiff outside of the jurisdiction should have the right to sue in Ontario upon a contract made payable at a place out of Ontario in the same way that such claims were suable in other Courts before the Act. The County Courts had the right anywhere in Ontario to entertain such claims if the defendant resided here. By this Section the same power is given to Division Courts, subject to the defendant's right to apply to have the place of trial changed, as provided for in Section 86.

(h) Sinclair's D. C. Act, 1880, 16-26.

Where a Division Court becomes seized under this Section of the right to entertain a claim, it would possess that right until the close of the case: *Haldan v. Beatty*, 43 U. C. R., 614.

As to the right to recover in the Province of Quebec on a personal service made in Ontario, in an action in which the cause thereof arose in Quebec, the reader is referred to *Court v. Scott*, 32 C. P., 148, and cases there cited.

place of payment is situate, subject, however, to the place of trial being changed to another division in which the court holden therein has jurisdiction in the particular case.

(2) To procure such change an order to that effect is to be obtained by the defendant from the Judge of the county in which the action is brought.

(3) The application for the order is to be made within eight days from the day on which the defendant who makes the application was served with the summons, where the service is required to be ten days before the return; or within twelve days after the day of such service, where the service is required to be fifteen days or more before the return.

(4) The application is to be on an affidavit that the applicant intends to defend the action, that he has a good defence upon the merits, that the cause of action did not wholly arise in the division in which the action is brought, and that the witnesses for the defence, or some of them, reside within the division in which the defendants, or one of

The defendant would not have the right to take his chances of winning and then obtain a change of the place of trial under this Section. See also the notes to Section 79.

It will be observed that the application for the change of the place of trial under sub-section 3, must be made within 8 days from the day of service of the summons. The Judge has no power to enlarge this time: *Sergeant v. Dale*, 2 Q. B. D., 558; *Hudson v. Tooth*, 3 Q. B. D., 46; *Mayor, &c. of London v. Cox*, 2 H. L., 239; *Barker v. Palmer*, 8 Q. B. D., 9; See *R. v. Murray*, 27 U. C. R., 134, and cases cited at page 236 of 9 P. R.; *Grant v. Holland*, W. N., 1880, 156; *Ex parte Luxon*. *In re Pidsley*, 20 Ch. D., 701.

In addition to the cases cited at page 20 of Sinclair's D. C. Act, 1880, as to the pecuniary interest of the Judge, see 4 Mews' Digest, 1145.

As to the affidavit to be made under this Section, see in addition to the cases cited at page 23 of Sinclair's D. C. Act, 1880, the following:—*Freehold Loan & Savings Co. v. Bank of Commerce*, 44 U. C. R., 284; *Martin v. The Consolidated Bank*, 45 U. C. R., 163; *Bank of Toronto v. McDougall*, 15 C. P., 475; *Tiffany v. Bullen*, 18 C. P., 91; *Carlisle v. Tait*, 32 C. P., 43; *Dickson v. The Neith & Breckon Ry. Co.*, L. R., 4 Ex., 87.

them, resided or carried on business at the time the action was brought, and that the application is not made for the purpose of delay; the date of the then next two sittings of the court to which he seeks to have the cause transferred is also to be shewn.

(5) The affidavit must be made by a defendant, or his solicitor or agent in case satisfactory reasons are given why the affidavit is not made by a defendant.

(6) The order shall direct at what sittings of the court the action shall be tried, subject to all rights of postponement as in other cases, and shall be attached to the summons and other proceedings in the action by the clerk, who shall forthwith transmit the same to the clerk of the court in which the action is by such order directed to be tried, and shall enter a minute thereof in his procedure book.

(7) Upon receipt of the order and other papers by the clerk of such last mentioned court, he shall enter the action and proceedings in his procedure book.

(8) All the papers and proceedings in the cause thereafter, shall be entitled and had and carried on as though the action had originally been entered in the said last mentioned court.

In addition to the cases cited at page 23 of the work already referred to of the necessity for defendants having an opportunity of shewing cause, see *The Tunbridge Wells Local Board v. Akroyd*, 5 Ex. D., 201, 202, *per Kelly*, C. B.; *Briggs v. Briggs*, 5 P. D., 163.

As to the meaning of the words "forthwith transmit" on page 25 of *Sinclair's D. C. Act, 1880*, see in addition to the authorities there cited: *Sinclair's D. C. Law*, 1885, 19, 20; *Ex parte Lamb. In re Southam*, 19 Ch. D., 169; *R. v. Berkshire (Justices)*, 4 Q. B. D., 469.

It will be observed that the order for change must direct at what sittings of the Court, to which the change is made, the action shall be tried. The latter Court will have all the rights of postponement and to deal with it as if it had

(9) It shall be the duty of the defendant obtaining the order forthwith to serve, or cause to be served, a copy of the same upon the plaintiff or his agent in the same manner as summonses are required to be served under this Act. 43 V. c. 8, s. 8.

87. (i) If by mistake or inadvertence an action shall be entered in the wrong Division Court which might properly have been entered in some other Division Court of the same or any other county, the cause shall not abate as for want of jurisdiction, but on such terms as the Judge shall order, all the papers and proceedings in the cause may be transferred to any Division Court having jurisdiction in the premises, and shall become proceedings thereof as though the cause were at first properly entered therein, and the same shall be continued and carried on to the conclusion thereof as though the action had originally been entered in the said last mentioned court. 43 V. c. 8, s. 11.

When
action
entered
in wrong
court by
mistake

been originally entered there. Upon receipt of the order and the other papers by the Clerk of the Court, to which it is transferred, the Clerk shall enter the action in the proceedings in his Procedure Book, and must treat it in the same manner as if the case had been originally entered in his Court.

The transfer would not be complete until the defendant obtaining the order should forthwith serve, or cause to be served, a copy of it upon the plaintiff or his agent. The plaintiff, however, could by his own act, waive the necessity for such service in this as in any ordinary case.

(i) Sinclair's D. C. Act, 1880, 28-29.

It is supposed, by some, that any case entered in a wrong Division Court is the subject of transfer to the right Court under this Section. Such is not so. There are only two cases where a Judge has a right to act upon this Section. First, if the action is brought by mistake; Second, by inadvertence. He has no power otherwise to make any transfer. If a party intending to get an advantage over another, or for any other purpose desire to sue in a Division Court other than that in which the suit should properly have been entered, a transfer should be refused under this Section. Power is given to the Judge to impose such terms as he may think proper in transferring a case, and the Judge to whose Court the case is transferred shall have all the rights which he would have possessed if originally sued in the proper Court. This Section does not

Clerks
and bail-
iffs may
sue and
be sued in
adjoining
divisions.

88. (j) Every clerk or bailiff may sue and be sued for any debt due to or by him, as the case may be, separately or jointly with another person in the court of any next adjoining division in the same county, in the same manner, to all intents and purposes, as if the cause of action had arisen within such next adjoining division, or the defendant was resident therein, and no clerk or bailiff shall bring any action in the Division Court of which he is clerk or bailiff. R. S. O. 1877, c. 47, s. 65.

Place of
trial in
actions
against
clerk or
bailiff.

89. (k) Notwithstanding anything in this Act contained, a clerk or bailiff of a Division Court may be sued in the court of an adjoining county, the place of sitting whereof is nearest to the residence of the defendant without the county in which he holds his office as clerk or bailiff; and upon a transcript of a judgment which may be recovered against any clerk or bailiff in such action being sent

Enforc-
ing judg-
ment.

declare what Judge is meant. No doubt the power to impose terms refers to the Judge of the Court in which the suit is entered and not the Judge of the Court to which it is transferred. It does not appear necessary under this Section to specify the day of the sittings to which the case so transferred shall be tried, as it does under the 6th sub-section of the next preceding Section.

(j) Sinclair's D. C. Act, 1879, 89.

Provision is here made for a Clerk or Bailiff being sued either separately or jointly with another person in the Court of any next adjoining Division in the same County. It is intended to give parties who have causes of action against either of such officers a right to have such sued in the adjoining Division with the same effect as if otherwise sued in the same way, as if the party was not either an officer of any Court—the Clerk or Bailiff. This provision, it must be observed, is only permissive. It does not compel a suitor, who may wish to sue such officers, to resort to such adjoining Division, but it prohibits any Clerk or Bailiff from bringing any action in the Division Court of which he is Clerk or Bailiff. Should there be a suit in the name of such Clerk or Bailiff in any Court before his appointment, it is submitted that it could be enforced in the ordinary way, notwithstanding such appointment.

(k) Sinclair's D. C. Act, 1880, 34-35.

It will be observed that the permission here given to sue a Clerk or Bailiff without the County in which he holds such office, is confined to the Courts of an "adjoining" County. In the work just referred to, the writer has attempted to give a meaning to the words "adjoining County." Whether exactly correct

to and received by the clerk of the court of any division adjoining the division for which the defendant was or is clerk or bailiff in the county in which the last named division is situate, with a certificate of the amount due on such judgment, as provided by section 217 of this Act, such proceedings for enforcing and collecting the judgment by way of execution and otherwise may be had and taken in the Division Court to which the transcript has been so sent by the officers thereof as may be had or taken for the like purpose upon a judgment regularly recovered in any Division Court. 43 V. c. 8, s. 15.

90. (b) Any action, by or against a Judge or Junior Judge of a County Court, which is within the competence of a Division Court, may be brought in a Division Court of any county adjoining that in which the Judge or Junior Judge resides; and any action by or against a Stipendiary Magistrate, if the same is within the jurisdiction of any Division Court of his district, may be brought in any Division Court of any adjoining county or district. R. S. O. 1877, c. 47, s. 66.

Action
against
County
Judge or
Stipendiary Magistrate.

or not has yet to be determined. In *Cohen v. Cleveland*, 43 Ohio, 190, it was held, that the words "bounding and abutting" have no such inflexible meaning as to require that the things spoken of actually adjoin or were necessarily in contact. See also 34 Alb. L. J., 104. Provision is also made for the enforcement of a judgment by transcript in the Division in the same County adjoining his own.

(b) It is part of the County Court Act that a Judge or Junior Judge shall reside in the County of which he is such, so that the words "County adjoining" may be taken to mean as adjoining that County of which the person sued is Judge or Junior Judge. Any action against a Stipendiary Magistrate is also suable in the County or District adjoining that for which he is such Magistrate.

In every case the claim must be one within the competence of some Division Court, and even should the parties consent to the trial of an action not suable in any Division Court, the Judge should refuse to try it. He has only power to try actions within the competence of a Division Court, and no consent could give him jurisdiction to try those beyond it: *Jones v. Owen*, 5 D. & L., 669; *Buse v. Roper*, 41 L. T. N. S., 457; *Wellesley v. Withers*, 4 E. & B., 759; *Foster v. Usherwood*, 3 Ex. D., 3.

Trial may
by con-
sent be
in any
division.

91. (m) Notwithstanding anything in this Act contained, any action within the jurisdiction of the Division Court may be entered, tried and finally disposed of by the consent of all parties in any Division Court. 43 V. c. 8, s. 10.

Clerks to
forward
sum-
monses
for ser-
vice in
other
divisions.

92. (v) The clerk of any Division Court shall, when required, forward all summonses to the clerk of any other Division Court for service, and the clerk of any Division Court shall receive any summonses sent to him by any other Division Court clerk for service, and he shall hand the same to the bailiff for service, and when returned shall receive the same from the bailiff and return them to the

(m) Sinclair's D. C. Act, 1880, 26-28.

The right to confer jurisdiction is, by this Section, given to the parties to any suit in a Division Court to consent, to try and finally dispose of the same in any Division Court.

As remarked in the notes to the preceding Section the suit must be triable in some Division Court. If beyond the jurisdiction of any Division Court, then this Section would not apply.

The Section does not require any written consent. It therefore can be given orally, or by words or conduct; and if once given, it could not be arbitrarily withdrawn: *Harvey v. Croydon*, U. R. Sanitary Authority, 26 Ch. D., 248.

A party by taking part in the trial of a case cannot afterwards object that he did not give his consent, but mere silence may not be so considered: *Ex parte McLaren*. *In re McColla*, 16 Ch. D., 534.

His laches might amount to consent: *Township of Pembroke v. Canadian Central Ry. Co.*, 3 Ont. R., 503; *Re Smart v. O'Reilly*, 7 P. R., 364. It was held in *Kerr v. Preston (Corporation)*, 6 Ch. D., 463, that a Board having Statutory power to consent, in writing, to a particular act, is not bound by tacit acquiescence. Should the parties consent be obtained by fraud, of course it would not bind him: *Willmott v. Barber*, 15 Ch. D., at p. 105. Fraud cannot be condoned unless there is full knowledge of the facts, and of the rights arising out of these facts, and the parties are at arms length: *Moxon v. Pagnon*, L. R., 8 Ch. App., 881. See also notes to Section 116.

(n) Sinclair's D. C. Act, 1879, 90.

Provision is here made to facilitate the proper performance of Division Court business in outer Divisions. The Clerk of the home Court shall, when required, forward a summons to the Clerk of any other Division Court for service. The Clerk of such Court shall receive such summons, and he shall hand the same to the Bailiff for service, and when returned by the Bailiff shall receive the same and forward them to the Clerk of the home Court. He is to keep a record in which all such proceedings shall be entered, and the tariff allows him compensation therefor.

clerk from whom he received them, and every clerk shall enter all such proceedings in a book to be by him kept for that purpose. R. S. O. 1877, c. 47, s. 67.

93. (o) In all cases not already provided for, where, in any action or proceeding in a Division Court, it is necessary for any party thereto to give notice to any other party thereto or to the clerk of the court such notice shall be in writing. 48 V. c. 14, s. 8.

Notices
to be in
writing.

Entry of Claim, Service, etc.

94. (p) (1) The plaintiff shall enter with the clerk a copy (and, if necessary, copies) of his account, claim or demand in writing in detail (and in cases of tort, particulars of his demand) and each copy shall be numbered according to the order in which the copies are entered, and thereupon a summons shall be issued, bearing the number of the account, claim or demand on the margin thereof, and corresponding in substance with such form as may be prescribed by the General Rules or Orders relating to Division Courts from time to time in force,

Plaintiff
to enter
copy of
his claim
with
clerk.

(o) Sinclair's D. C. Law, 1885, 197.

Before this Section some difficulty was found in Division Court proceedings where a particular Section or Rule of Court did not prescribe whether notice should be verbal or in writing. The object of this clause is to provide that in all cases it shall be necessary to give notice to the Clerk of the Court, or the opposite party, in writing, wherever notice is necessary.

(p) Sinclair's D. C. Act, 1879, 90-92; Sinclair's D. C. Act, 1886, 21, 22.

This Section makes provision as to the manner of entering a Division Court suit. It will be observed that the plaintiff is required to enter with the Clerk a copy, and if necessary copies, of his claim or demand in writing "in detail," and in case of tort (that is "personal actions" under Section 70, sub-section (a),) and prescribes how each copy shall be numbered and entered. Upon this being done, it is made the duty of the Clerk to issue a summons in the manner pointed out and according to the rules and forms prescribed. On the trial of the cause no evidence shall be allowed concerning any cause of action except such as is contained in the account, claim or demand so entered, or in the particulars of demand, if the action is in tort, unless an amendment is made.

according to the nature of the account, claim or demand, and on the trial of the cause no evidence shall be given by the plaintiff of any cause of action except such as is contained in the account, claim or demand so entered. R. S. O. 1877, c. 47, s. 68.

(2) In any action brought to recover a sum of money due on a promissory note, the note shall be filed with the clerk before judgment, unless otherwise ordered, or unless the loss of the note be shewn, or that it cannot for some other satisfactory reason be produced. 49 V. c. 15, s. 7.

Plaintiff
to furnish
particu-
lars of
claim to
the clerk
for
service.

95. (g) The plaintiff shall furnish the clerk with the particulars of his claim or demand, and the clerk shall annex the plaintiff's particulars to the summons, and he shall furnish

Sub-section 2 requires that where the action is brought to recover a sum of money due upon a promissory note, that such note shall be filed with the Clerk before judgment unless the Judge otherwise orders, or unless the loss of the note be shewn, or that it cannot for some other satisfactory reason be produced.

Too much precaution cannot be taken either by a plaintiff himself, or by any person on his behalf observing the provisions of this Section.

Frequently such forms of account as "to amount of account rendered" is given as the particulars here required. Such is not correct. What the Statute requires is particulars in detail, unless it be that the account has been stated and settled between the parties, and that the balance which the plaintiff claims is the amount so settled. In that case it should appear upon the face of the particulars that the account has been duly stated and settled: *Lemere v. Elliott*, 6 H. & N., 656; *Buck v. Hurst*, L. R., 1 C. P., 297, *Lane v. Hill*, 18 Q. B., 252. As to the "account stated," see page 81 *ante*.

And it must be a statement of acknowledgment on account of a subsisting debt: *Tucker v. Barrow*, 7 B. & C., 623.

An account stated of a claim beyond the jurisdiction of the Court would be suable, if the amount arrived at was within the jurisdiction of the Division Court; but a balance of an account beyond the jurisdiction of the Court, and not stated, would not be suable. It would therefore appear that there always is a necessity, not only as a matter of practice, but as a matter of jurisdiction, that the claim should *prima facie* be within Division Court jurisdiction.

As to the claim and particulars, see Division Court Rules, 3 to 8.

(g) *Sinclair's D. C. Act*, 1879, 92.

This Section prescribes, as it will be observed, that the plaintiff shall furnish the Clerk of the Court with the particulars of his claim and demand, and

copies thereof, to the proper person to serve the same. R. S. O. 1877, c. 47, s. 69.

96. (7) The summons, with a copy of the account or of the particulars of the claim or demand attached, shall be served ten days at least before the return day thereof. R. S. O. 1877, c. 47, s. 70.

Service of
summons
to be ten
days.

97. (8) In case none of the defendants reside in the county in which the action is brought, but one of them resides in an adjoining county, the summons shall be served fifteen days, and in case none of the defendants reside in the county within which the

When
service to
be 15 days
and when
20 days.

it is made the duty of the Clerk to annex the same to the summons, and that he shall furnish copies thereof to the proper persons to serve the same. This Section directs what the plaintiff, or any person acting for him, shall do, and has prescribed the duty of the Clerk concerning the particulars and issue of the summons. Should the Clerk not observe his duty in the manner here pointed out, it would not vitiate the proceedings. They could be amended and, if necessary, upon proper terms, the principle of law that the act of the Court shall not injure any man being applicable. Any damage which the plaintiff might sustain by the want of reasonable care on the part of the Clerk in this respect would be the subject of an action against him and his sureties.

(7) Sinclair's D. C. Act, 1879, 92, 93.

As remarked in the work to which we have referred, the ten days mentioned in this Section mean *clear days*, that is, exclusive of the day of service and day of Court. Sunday would be included as one of the ten days. The defendant must have the proper time, and the case cannot be tried without his consent before the time prescribed by law. The defendant by entering a disputing notice does not debar himself from saying that he is entitled to the time which the Statute allows: *Zantz v. Mann*, 16 L. J. N. S., 144.

Some difficulty may be experienced in serving a defendant who is *non compos mentis*. It is submitted that service should be made on a person of unsound mind personally and also a copy on the person in whose care he is: *In re Crabtree's Settled Estates*, L. R., 10 Ch., 201.

Service may now be made upon parties who are added as defendants, whether individuals or partners, and service may be made on such under Section 108 of this Act.

Where an officer swears to service of a summons and the defendant denies the officer's oath, the oath of the officer is preferred: 1 C. L. Cham., 135.

(8) Sinclair's D. C. Act, 1879, 93.

Division Court summons shall be served fifteen days at least before the Court, where both the defendants or one of them resides in an adjoining County. Where none of the defendants reside in an adjoining County, the summons shall be served twenty days at least before the return day thereof.

action is brought, or in an adjoining county, the summons shall be served twenty days at least before the return day thereof. R. S. O. 1877, c. 47, s. 71.

Indorse-
ment
upon
sum-
mons.

98. (t) There shall be indorsed upon every summons a notice informing the defendant that in any case in which an order may be made changing the place of trial, application must be made to the Judge within eight days after the day of service thereof (where the service is required to be ten days before the return), or within twelve days after the day of such service (where the service is required to be fifteen days or more before the return). 43 V. c. 8, s. 13.

When
service to
be per-
sonal
or other-
wise.

99. (u) In case the amount of the account, claim or demand exceeds \$8, the service shall be personal on the defendant, and in case the amount does not exceed \$8, the service may be on the defendant, his wife, or servant, or some grown person being an inmate of the defendant's dwelling-house, or usual place of abode, trading or dealing. R. S. O. 1887, c. 47, s. 72.

The same meaning must be given to the words "at least" as is in the next preceding Section, namely, excluding the day of service and the day of Court: See Division Court Rules, 18-32; Sinclair's D. C. Act, 1879, 242-246.

(t) Sinclair's D. C. Act, 1880, 30, 31.

Division Court Clerks should be careful to observe this provision. Any case where the notice informing the defendant that the place of trial may be changed is omitted, it would be an irregularity which the defendant could take advantage of, and probably at the plaintiff's expense—the re-serving of the summons and the postponement of the trial.

The time within which the application must be made to the Judge to change the trial is specific. No power is given to the Judge to enlarge the time. If, after due service made, application is not made within the time prescribed by this Section, the right would be gone. See the notes to Section 86 hereof.

(u) Sinclair's D. C. Act, 1879, 93-95.

What is personal service will be found discussed in the pages we have just referred to. Where the plaintiff's claim does not exceed \$8, the service may be on the defendant, his wife or his servant or some grown person being an

General Provisions.

100. (v) Where it is made to appear to the Judge upon affidavit that reasonable efforts have been made to effect personal service of the summons upon the defendant, primary debtor or garnishee, and either that the summons has come to the knowledge of the defendant, primary debtor or garnishee, or that he wilfully evades service of the same, or has absconded, the Judge may, by order, grant leave to the plaintiff to serve the writ in such manner, at such place, or upon such person for the defendant, primary debtor or garnishee, as to him may seem proper, and may grant leave to the plaintiff to proceed as if personal service had been effected, subject to such conditions as the Judge may impose. 43 V. c. 8, s. 62.

Substitu-
tional
service.

inmate of his dwelling house or his usual place of abode, trading or dealing. The affidavit of the Bailiff should show particularly upon whom service is made if not personal; Sinclair's D. C. Law, 1885, 96-110.

As to what is a man's usual place of abode, trading or dealing: See notes to Sections 81, 82.

When the plaintiff's claim exceeds \$8, the service shall be personal on the defendant, unless substitutional service is ordered. No distinction is here made between actions of Tort and Contract.

Too much care cannot be observed by Bailiffs who effect service of summons on claims under \$8 otherwise than personal, to specify the person on whom service is made and that the person served is one of those prescribed by this Section.

(v) Sinclair's D. C. Act, 1880, 92-93.

As has been remarked in another part of this work (notes to Section 70), the process from the Division Court does not run beyond the Province of Ontario: Ontario Glass Co. v. Swartz, 9 P. R., 252. Originally it did not extend to persons residing out of the County: Dalmage v. The Judge of Leeds and Grenville, 12 U. C. R., 32.

If, therefore, a summons is issued against a person not subject to Division Court process, there could not be substitutional service under this Section: Robertson v. Mero, 9 P. R., 510; *In re Easy*. *Ex parte* Hill and Hymans, 19 Q. B. D., 538; Orkney v. Shanahan, 8 L. R. Irish, 155; Furber v. King, 29 W. R., 535; Wolverhampton and Staffordshire Banking Co. v. Bond, 43 L. T. N. S., 721; Chitty's Forms, 11th Ed., 76; Firth v. Bush, 9 Jur. N. S., 431; Société Générale de Paris v. Dreyfus Brothers, 29 Ch. D., 239. See also notes to Sections 100, 183 and 186 of this Act.

If substitutional service should be ordered where the defendant was beyond the jurisdiction of the Court, unless specially authorized by Statute, no valid

Service of
process,
etc., on
corporations.

101. (w) (1) Every summons or process issued out of a Division Court against a corporation not having its chief place of business within the Province, and all subsequent papers and proceedings in the action, or proceeding in which the summons or process has been issued, may be served on the agent of the corporation whose office or place of business as such agent is either within the division in which the summons or process issued, or is nearest thereto.

(2) For the purposes of this section the word "agent" shall be held to include,

(a) In the case of a railway company a station-master having charge of a station belonging to the railway company;

(b) In the case of a telegraph company, a

judgment could be entered thereon: *Berkley v. Thompson*, 10 App. Cas., 46. But if substitutional service is properly ordered, judgment entered upon it could only be set aside as if entered on personal service: *Watt v. Barnett*, 3 Q. B. D., 363.

The affidavit which is here required should shew one of three things—

(1) That reasonable efforts have been made to effect personal service upon the defendant, primary debtor or garnishee; and either that the summons has come to his knowledge, or

(2) that he wilfully evades service of the same; or

(3) has absconded.

As to what are reasonable efforts must depend on the circumstances of each particular case: *Sinclair's D. C. Act*, 1880, 92-99. The same may be said of evading service.

"Absconded," we submit, here means having absconded from the Province of Ontario, not necessarily from the Dominion of Canada. As to the further meaning of the words "has absconded" the reader is referred to Section 249 hereto. The writer further submits that if a man *has* absconded process cannot be issued against him, and proceedings must be taken against him in another Court.

(w) *Sinclair's D. C. Law*, 1885, 211-217.

As remarked in that work, at pages 215 and 216: "The definition which the Statute here gives to the word 'agent' is not intended to define the only class of agents that may be served. The word is given by way of example, and not as determining who only may be served as an agent."

In *Baillie v. Goodwin & Co.*, 33 Ch. D., 604, it was held—where the defendants were a Scotch firm, having an agent within the jurisdiction whose authority did not extend to taking orders, but the name of the firm was affixed to the agent's offices—that the office of the agent was not a place of business

person having charge of a telegraph office belonging to the telegraph company, and

(c) In the case of an express company, a person having charge of an express office belonging to the express company. 48 V. c. 14, s. 11.

102. (x) The postages of papers required to be served out of the Division, and sent by mail for service, shall be costs in the cause. R. S. O. 1877, c. 47, s. 73. Postages.

103. (y) Where there is no bailiff of the court in which the action is brought, or when the bailiff has been suspended by order of the Judge, or where any summons, execution, subpœna, process or other document, is required to be served or executed elsewhere than in the division in which the action is brought, it may, in the election of the party, be directed to be served and executed by the bailiff of the division in or near to which it is required to be executed, or by such other bailiff or person as the Judge, or clerk issuing the same, orders, and may, for that purpose, be transmitted by How process, etc., may be executed at a distance.

of the firm, for the purpose of serving the writ, within the meaning of the Judicature Act. In cases under this Section the fact of there being an "agent" of the body corporate, and that he, "as such agent," has his office or place of business nearest to the place where the cause of action arose, is the test of a plaintiff's right to effect service on him: See notes to Section 81, Sinclair's D. C. Law, 1885, 211-217.

As to a man having more than one residence: See *Walcot v. Botfield*, 18 Jur., 570; *Cartwright v. Hinds*, 3 Ont. R., 395.

The issuing of a summons, execution or other process from the Division Court is not a judicial act; it does not relate back to the earliest period of the day, and the Court may inquire at what period of the day it issued: *Clarke v. Bradlaugh*, 8 Q. B. D., 63.

(x) Sinclair's D. C. Act, 1879, 95.

In addition to the authorities at the above page, we refer to the notes to Section 46 hereto.

(y) Sinclair's D. C. Act, 1879, 95, 96, and D. C. Act, 1886, 23.

The words "or when the Bailiff has been suspended by order of the Judge"

post, or otherwise, direct to such bailiff or person, without being sent to or through the clerk. R. S. O. 1877, c. 47, s. 74; 49 V. c. 15, s. 8.

Duties of
bailiff
and lia-
bility of
sureties

104. (2) In cases mentioned in the last preceding section it shall be the duty of the bailiff to serve and execute all summonses, executions, subpœnas, process and other documents, and make return thereof with reasonable diligence, and to pay over, on demand, all moneys by him levied or received thereon; and for neglect or default therein, in addition to any other remedy against the bailiff, he and his sureties shall be liable, on their covenant to the parties aggrieved, as if the summonses, executions, subpœnas, process and documents had issued from or related to some action in the court of which he is bailiff. R. S. O. 1877, c. 47, s. 75.

did not originally form part of this Section, but were introduced in 1886, and are now consolidated with what was the 74th Section of the former Division Courts Act. It will be observed that the Bailiff who acts under the provisions of this Section, together with his sureties, is as responsible for his acts as if the proceeding was in his own Court: See Section 104.

(2) Sinclair's D. C. Act, 1879, 96, 97.

As to service of summonses, subpœnas, process, and other documents: See Sinclair's D. C. Act, 1879, 93-95.

The Bailiff, or his sureties, would not be liable upon their covenant for moneys levied or received by him, except after "demand" made. This would not be so unless the Statute required it: *Gibbs v. Southam*, 5 B. & Ad., 911. It is submitted that an action against the Bailiff alone could be maintained without a "demand," if not brought upon his covenant, but for money had and received. The "demand" should be on the Bailiff: *Davies v. Funston*, 45 U. C. R., 369.

The sureties would only be liable for moneys that might be received by the Bailiff *as such*. If a Bailiff had no legal authority to receive moneys—as if he had no valid and subsisting execution in his hands—his receipt of money would not be by him as Bailiff of the Court, but simply as an individual: *McArthur v. Cool*, 19 U. C. R., 476; *Preston v. Wilmot*, 23 U. C. R., 348; *Kero v. Powell*, 25 C. P., 448; *McLeish v. Howard*, 3 App. R., 503; *State v. Davis*, 34 Alb. L. J., 424.

A recovery against the Bailiff would be a bar to a subsequent action against the sureties: Sinclair's D. C. Act, 1879, 26; *Miller v. Corbett*, 26 U. C. R., 478.

As to the necessity for a demand: See Add. on Con., 8th Ed., 1191; *Toms v. Wilson*, 4 B. & S., 442; notes to Section 70, title "Principal and Surety," and the pages of the work first cited.

105. (a) The clerk shall prepare affidavits of service of all summonses issued out of his court, or sent to him for service stating how the same were served, the day of service, and the distance the bailiff necessarily travelled to effect service, and the affidavits shall be annexed to or indorsed on the summonses respectively; but the Judge may require the bailiff to be sworn in his presence, and to answer such questions as may be put to him touching any service or mileage. R. S. O. 1877, c. 47, s. 76.

Clerk to prepare affidavits of service etc.

Partners.

106. (b) In case of a debt or demand against two or more persons, partners in trade or otherwise jointly liable, but residing in different divisions, or one or more of whom cannot be found, one or more of such persons

One of several partners may be sued in certain cases.

(a) Sinclair's D. C. Act, 1879, 97.

We need scarcely remark again upon the necessity for the Clerk's observing care in the preparation of all affidavits. If the affidavit of service of any process should be defective, it could be amended and re-sworn. It would not invalidate the service if properly made. The act itself being properly done, the proof of it, though defective, would not invalidate the service. A fresh affidavit could be made: See *Fee v. McIlhargey*, 9 P. R., 329, where it was held that the Division Court Rules are not imperative.

There are some cases, however, where the absence of an affidavit would render the proceedings invalid. Thus, in the case of a judgment summons, we submit that it could not properly issue, or an order for commitment thereon be properly made, unless the affidavit required by Section 235 was first made and filed. It could, however, be waived by the defendant by allowing himself to be sworn and examined or otherwise: *Sinclair's D. C. Act, 1880, 82.*

Notwithstanding what has been said to the contrary, the writer now submits that the process of judgment summons does not apply on a judgment against a married woman: *Scott v. Morley*, 20 Q. B. D., 120.

(b) Sinclair's D. C. Act, 1879, 97, 99.

The object of this Section was to give a creditor of partners in trade, or otherwise jointly liable to him, a remedy against both or several partners, although one only might be served, where the others could not be found or where the debtors might be residing in different Divisions. Since the passing of what is now Section 108, this Section will not be so much resorted to.

As remarked at page 97 of the above work, the Section only applies to cases in which the action is brought for a "debt or demand." It would not have

may be served with process, and judgment may be obtained and execution issued against the person or persons served, notwithstanding others jointly liable have not been served or sued, reserving always to the person or persons against whom execution issues his or their right to demand contribution from any other person jointly liable with him. R. S. O. 1877, c. 47, s. 77.

Bailiff
may seize
property
of firm on
certifi-
cate of
Judge.

107. (c) Where judgment has been obtained against such partner, and the Judge certifies that the demand proved was strictly a partnership transaction, the bailiff, in order to satisfy the judgment and costs and charges thereon, may seize and sell the property of the firm, as well as that of the defendants who have been served. R. S. O. 1877, c. 47, s. 78.

any application in personal actions under Section 70, sub-section (a). What is meant by "debt or demand" will more fully appear by reference to the notes to Sections 70 and 109 hereto, and to pages 99-101 of Sinclair's D. C. Act, 1879.

As remarked in the work referred to, a judgment against one of several joint debtors is a bar to any action against the rest of them, and such is the law still, unless there is some Statute which saves the creditor's rights against the others. In addition to *King v. Hoare*, 13 M. & W., we refer to 36 Alb. L. J., 245, 265, as collecting the leading American cases on the same subject.

As to joint and several contracts, the reader is referred to Add. on Con., 8th Ed., 1412, and the pages there cited; and to the leading principles of partnership, 5 Mews' Digest, 869; *Neilson v. Mossend Inv. Co.*, 11 App. Cas., 298.

(c) Sinclair's D. C. Act, 1879, 98, 99.

It will be observed that if proceedings are taken under the next preceding Section, execution can only be executed on the partnership property where the Judge who orders judgment certifies that the demand proved "was strictly a partnership transaction." This certificate had better be endorsed on the execution. With the writ of execution and this certificate the Bailiff may seize and sell the property of the firm as well as that of the defendant or defendants who have been served. It will be observed that the right to realize the debt is confined to the property of the partnership as well as of the defendant who has been served. The provisions of the Ontario Judicature Act are somewhat the same in regard to proceeding against partners. A judgment under the next previous Section may, under the circumstances there mentioned, be obtained against one or more defendants "otherwise jointly liable," but execution cannot be levied upon any but partnership property or that of the partner who has been served.

Adding Parties.

108. (d) The following provisions shall ^{Adding defendant.} apply to and in respect of any action brought in a Division Court ;

1. The Judge may, at any time after action commenced, upon the application of either party, and upon such terms as may appear to him to be just, order that the name of any party who ought to have been joined in the action as a defendant shall be added as a party defendant.

2. If it shall appear to the judge, either before or at the trial of an action, that any party ought to be added as a party defendant in order that the Court may settle all rights and questions involved in the action, the Judge may order such person to be added accordingly.

(d) Sinclair's D. C. Act, 1886, 73-77.

Before this provision was made there appeared to be no power in cases in the Division Court to add a party defendant : Sinclair's D. C. Act, 1879, 263 ; Building and Loan Ass. v. Heimrod, 19 L. J. N. S., 254 ; Barber v. Bingham, 20 L. J. N. S., 65. Now, if the Judge considers that it is necessary for the purpose of settling all rights and questions involved in the action that any person or persons should be added as defendant or defendants, it is his imperative duty to make all necessary amendments for the purpose : Sinclair's D. C. Law, 1884, pages 65-68.

The summons should first be properly amended if the application is made before the trial and such application allowed. In such case the summons must be served on the added defendant, and he would have the same rights of defence and time therefor that he would have had if the action had been commenced against him on the day the Judge's order adding him as a defendant was made. Should there be no application made before the trial, but the order was applied for at the trial, the Judge could make the order in a summary manner and dispense with service of the summons on the defendant so added, provided he or his solicitor should consent thereto. The costs of amendment and postponement of the trial are left in the discretion of the Judge. A defendant could not properly be added on an *ex parte* application : Tildesley v. Harper, 3 Ch. D., 277. An administrator or executor of one of several defendants could be added : Ashley v. Taylor, 10 Ch. D. 768. The object of the Statute is that 'all rights and questions involved in the action should be settled.'

Another important provision is made in this Section in respect to the rights of action for and against partners as such. This provision has been taken from Rule 13 of the English County Court Rules of 1886. Under sub.

Service
on parties
added.

3. Every person whose name is so added as a defendant shall be served with a copy of the writ of summons, the original summons being first properly amended, and the proceedings against such added defendant, shall be deemed to have been commenced from the date of the order making him a party defendant; but if the application to add a defendant be made at the trial, the Judge may make the order in a summary manner, and may dispense with the service of a copy of the summons upon such defendant, if such defendant or his solicitor consent thereto, upon such terms as to costs or an adjournment of the trial, as to the Judge shall appear just.

Service
on
partners.

4. Any two or more persons claiming, or being liable as co-partners may sue, or be sued in the name of the respective firms, if any; where partners are sued in the name of their firm, the summons may be served on one or more of the partners and subject to the provisions in the next two sub-sections contained,

section 4 of this Section partners may sue or be sued in their firm name. It is not imperative on a plaintiff, but permissive, to sue a partnership in the name of the firm. There are reasons why in many cases it may not be advisable for a plaintiff to do so. He may not wish to pursue the remedies against a partnership that the law points out. He may prefer to proceed against them individually as defendants as before: Sinclair's D. C. Law, 1885, page 52.

It will be observed that where partners are sued in the name of their firm the summons may be served on one or more of the partners, following C. J. Act in that respect. It is declared that such shall be deemed good service on the firm.

The affidavit of service of summons must state the name of the partner or partners served.

Provision is here made that any party to the cause may at any time either before or after judgment apply for and obtain an order for a statement to be furnished of all the persons who are co-partners in any firm which is a party either as plaintiff or defendant to the action by the firm named. It is submitted that, notwithstanding *Pollexfen v. Sibson*, 16 Q. B. D., 792, a member of a foreign firm could not be served in this Province so as to bind the firm under this Section: Sinclair's D. C. Law, 1884, page 21.

A firm, as such, cannot be garnished. The attachment of the debt should

such service shall be deemed good service upon the firm; but the affidavit of the service of the summons shall state the name of the partner served. Any party may, at any time before or after judgment, apply to the Judge for an order directing a statement to be furnished of the names of all the persons who are co-partners in any firm which is a party to the action by the firm named.

5. Where a judgment is against partners in the name of the firm, execution may issue in the manner following :—

Execu-
tion
against
partners.

- (a) Against any goods of the partners.
- (b) Against the goods of any person who has admitted in the notice of dispute or defence filed that he is or who has been adjudged a partner.
- (c) Against any person who has been served as a partner with a copy of the summons and who has failed to appear.

be against the individual members of the firm: *Walker v. Rooke*, 6 Q. B. D., 631.

The 5th sub-section provides how execution may issue on a judgment against partners in the name of the firm. It has evidently been taken from the English County Court Rules of 1886, Order xxv., Rule 8. The action being against a firm, the goods of the firm are first made answerable for the debt. This follows the rule as to the equitable liquidation of partnership debts. Next, the goods of any person who has admitted in the notice of dispute or defence that he is a partner or has been adjudged a partner are made subject to the partnership debt, in effect rendering the separate goods of such several partners liable with the goods of the firm. Lastly, the goods of any person who has been served as a partner with a copy of the summons and did not appear, and against whom judgment passed by default, are also liable.

The 6th sub-section of this Section has in a measure been taken from Order iii., Rule 15, of the English County Court Rules of 1886. It has been adapted to our Division Court practice. Many reasons may be suggested why a plaintiff may desire to have a remedy against the individual members of a firm instead of a remedy against the firm as such. Where the action is brought against a partnership firm in the name of the firm, the judgment must be against the firm, and it cannot be separately entered against an individual member of the firm who has neither been served nor defended the action: *Jackson v. Litchfield*, 8 Q. B. D., 474; *Adam v. Townend*, 14 Q. B. D., 103. If the plaintiff desires a judgment against all the partners individually, though

Adding
partners
as defend-
ants.

6. Upon the trial of an action against a firm, if the plaintiff is desirous of obtaining a judgment against the individual partners, other than the one served with a copy of the summons, and in addition to his judgment against the firm, he may procure the addition of the remaining partners as defendants under sub-sections 1 and 3 of this section, and thereafter proceed to judgment against them in the action as in other cases. 49 V. c. 15, s. 21.

*Judgment by Default where Specially
Indorsed Summons.*

109. (e) (1) In actions brought in a Division Court for the recovery of any debt or

having brought his action against them as a firm, he may amend his summons by adding the partners not served as defendants and having each served as provided for under sub-section 3 of this Section. On this being done, he may proceed to judgment against them as if they had originally been made defendants. This sub-section does not proceed to declare what the rights of the parties in such case are after judgment. It is submitted that while in an action against a firm as such, the proceedings after judgment are not so much of a personal character, but more against the property of the firm: the addition of the names of the separate members of such firm under this sub-section, and proceedings duly taken to judgment against them, as well as against the firm, would give all remedies against such added defendants as if originally sued separately. A judgment against a firm would, it is submitted, subject any member of the firm to a judgment summons: See *Sinclair's D. C. Act*, 1879, 189, and following pages; *Taylor v. Cook*, 11 P. R., 60.

It will be observed that in this proceeding the only persons who can be added as defendants individually are those "other than the one served with a copy of the summons."

A judgment may more easily be obtained against a firm than against its individual members, but the writer has to express a preference for the latter. It is submitted that it will be found more advantageous.

The remedy by execution appears to be twofold. *First*, against the goods of the firm as such. *Secondly*, against the separate goods of those members of the firm who may be brought within the provisions of sub-section 5 (b) and (c).—*Sinclair's D. C. Act*, 1886, 74-77.

See also *Ex parte Ide. In re Ide*, 17 Q. B. D., 755.

The Forms of proceeding probably necessary under this Section will be found at pages 77-79 of the *D. C. Act*, 1886.

As to the effect of the admissions of a partner on his co-partners: See *Taylor v. Cook*, 11 P. R., 60.

(e) *Sinclair's D. C. Act*, 1879, 99-102.

The words here used, "any debt or money demand," have not, so far as the

money demand, where the particulars of the plaintiff's claim, with reasonable certainty and detail, are indorsed on or attached to the summons, and a copy of the summons and particulars, with a notice in the form prescribed by the General Rules or Orders relating to Division Courts from time to time in force, annexed to or endorsed on such copy, has been duly served, then, unless the defendant has left with the clerk, within eight days after the day of service (where the service is required to be ten days before the return), or within twelve days after the day of service (where the service is required to be fifteen days or twenty days before the return) a notice to the effect that he disputes the claim, or some part, and how much thereof, final judgment may be entered by the clerk on the return of such summons, or at any time within one

summons
final judgment
entered
by the
Clerk,
when
claim not
disputed,
etc.

writer is aware, been the subject of any reported case. It is submitted that the following may, in the absence of a better, be an appropriate definition: Any claim, legal or equitable, on contract express or implied, on which a certain sum of money not being unliquidated damages may become due and payable.

The Section applies to actions for sums beyond \$100. It only applies where the particulars of the plaintiff's claim conform to Section 94. See also Sinclair's D. C. Act, 1879, 90, 91. They must be of "reasonable certainty and detail," and should be endorsed on or attached to the summons.

If the defendant desires to defend the action, he may do so by leaving with the Clerk within the prescribed time a notice disputing the plaintiff's claim. If the defendant resides in the same County, the notice must, as remarked at page 100 of Sinclair's D. C. Act, 1879, be left within eight days (exclusive of the day of service), and if in another County, whether adjoining or not, within twelve days of the day of service. A Judge would not have power to *extend* this time. No power is given him by the Statute to do so, and he would have no authority otherwise: *R. v. Murray*, 27 U. C. R., 134; *R. v. G. W. Ry. Co.*, 32 U. C. R., 506. But he could allow a defendant in to defend, under Section 112 or sub-section (3) of this Section.

If the summons is issued for such a claim as the law prescribes, and is duly served, judgment may be entered by the Clerk on the summons and particulars of claim upon an affidavit of due service thereof having been filed with him. The judgment may either be for the full amount, if not disputed, or, if a part only is not disputed, then, if the plaintiff so wishes it, for such part. We think a final judgment for a part would be a bar to a subsequent action for the balance of the claim.

In addition to the cases cited at pages 99 and 100 of Sinclair's D. C. Act,

month thereafter for the amount claimed in such particulars or so much thereof as has not been disputed, if the plaintiff is content with judgment for such part; and execution may afterwards issue thereon at the instance of the plaintiff.

Sum-
mons,
particu-
lars and
affidavit
to be
filed.

(2) The final judgment so entered may be in the form prescribed by the General Rules or Orders relating to Division Courts from time to time in force, but no such judgment shall

1879, as to what is a "debt or money demand," the following are referred to:

An action on a covenant in a lease for unascertained damages: *Gowanlock v. Mans*, 9 P. R., 270.

It was doubted in *Green v. The Hamilton Provident Loan Co.*, 31 C. P., 574, whether a surplus in the hands of a mortgagee after sale of land was a purely money demand. In a subsequent case it was held that such money was in the nature of an equitable cause of action for money had and received: *Re Legarie v. The Canada Loan & Banking Co.*, 11 P. R., 512.

Money held by an executor on sale of property of his testator would not be a "debt or money demand" within this section: *Soules v. Soules*, 35 U. C. R., 334. Money payable on a policy of insurance in the form this policy was, held to be a purely money demand. With all respect we doubt the authority of this case. As to what was held "a purely money demand," see *Cole v. The Bank of Montreal*, 39 U. C. R., 54.

An action for breach of covenant for title to land is certainly not within the Section: *Kavanagh v. The Cor. of Kingston*, 39 U. C. R., 415.

An action on an interim insurance receipt would appear to be within the Statute: *Kelly v. The Isolated Risk and F. F. Ins. Co.*, 26 C. P., 299.

A judgment of another Provincial Court would be suable under the words used here: *Henderson v. Hendersor*, 6 Q. B., 288. Or a judgment of any other Court of Record: *Hutchinson v. Gillespie*, 11 Ex., 798. Or the judgment of a foreign Court: *Grant v. Easton*, 13 Q. B. D., 302. But not an action for arrears of alimony during the pendency of the suit: *Bailey v. Bailey*, 13 Q. B. D., 855.

An action on an account stated would be within the Section: *Sinclair's D. C. Law*, 1825, 53-62.

A defendant giving notice of set-off or other statutory defence, or paying money into Court, or pleading a tender, would be sufficiently giving the Clerk notice under this Section: *D. C. Rule 20*; *Sinclair's D. C. Act*, 1879, 243.

To an action on a Solicitor's Bill it is not necessary for the plaintiff to shew any authority by Statute to bring the action, but any defence, such as the non-delivery of a signed Bill of Costs one month before the action must be pleaded, or notice given under this Section if in the Division Court, but where such as a medical man's bill is sued for it is not necessary to deny his license; it forms part of his proof: *Sharpe v. Waistaff*, 3 M. & W., 521; *Shearwood v. Hay*, 5 A. & E., 353. The reason is that at Common Law a physician could not sue for his services, and he can only do so now by virtue of the Statute: *Kennedy v. Broun*, 13 C. B. N. S., 677.

be so entered until the summons and particulars, with an affidavit of the due service of both, have been filed.

(3) The Judge may set aside such judgment, and permit the case to be tried, on sufficient grounds shewn, on such terms as to costs and otherwise as he thinks just. R. S. O. 1877, c. 47, s. 79.

The Judge may set aside judgment.

§ 40. (f) When due proof is made by affidavit or otherwise of the service of a special summons issued under the preceding section of this Act, and of particulars of the plaintiff's claim or demand as required by the said section, and final judgment has not been entered under the provisions thereof, the Judge may, if the defendant does not, in person or by agent, appear in open court pursuant to and as required by the summons, give judgment against the defendant by default, without requiring proof of the plaintiff's claim or demand, and with the same consequences and effect as if the plaintiff had proved his claim or demand in open court. 48 V. c. 14, s. 3.

Judgment by default under s. 109, where final judgment not entered.

A plaintiff may take judgment against one of several defendants served (D. C. Rule 22), or such, if several, as have been served (Rule 23).

In regard to judgment against a defendant or defendants where there are other defendants: See Sinclair's D. C. Act, 1879, 242-246.

As to the Judge's allowing a defence to be entered before judgment actually entered: See Sinclair's D. C. Act, 1879, 103, and Section 112 hereto.

The case of *Girdlestone v. The Brighton Aquarium Co.*, cited at page 102 of Sinclair's D. C. Act, 1879, is reported and sustained in Appeal at page 107 of 1 Ex. D.

As to setting aside previous fraudulent judgments: See Sinclair's D. C. Act, 1886, 56.

A defendant would not be bound by an unauthorized appearance: *Anderson v. Hawke*, 1 Western Rep., 626.

The pages cited at pages 201 and 202 of Smith on Negligence afford information as to the class of cases that will not be considered "a debt or money demand."

(f) Sinclair's D. C. Law, 1885, 41-67.

The reader will find the provisions of this Section duly discussed at the pages of the work above mentioned.

Motion
for judg-
ment.

1111. (g) (1) Where the defendant in an action within the meaning of section 109 of this Act, has left with the clerk a notice to the effect in the said section provided, the plaintiff in the action may, on an affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, serve the defendant with a notice of motion to shew cause before the Judge of the Division Court in which the action is brought, why the plaintiff should not be at liberty to have final judgment entered in his favour by the clerk for the amount of the debt or money demand sought to be recovered in the action, together with interest, if any, and costs. A copy of the affidavit shall accompany the notice of motion. The Judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend the action, make an order empowering the clerk to sign final judgment accordingly.

(2) The application by the plaintiff for leave to have final judgment entered in his favour under the provisions of this section, shall be made on notice returnable not less than two clear days after service.

(3) The defendant may shew cause against the application by offering to bring into court the amount sought to be recovered in the action, or by affidavit. In the affidavit he

(g) Sinclair's D. C. Law, 1885, 78-130.

A full discussion of the questions which this Section presents, with Forms

shall state whether the defence he alleges goes to the whole or to part only, and if so, to what part of the plaintiff's claim. And the Judge may, if he thinks fit, order the defendant to attend and be examined upon oath, or to produce any books or documents, or copies of, or extracts therefrom.

(4) In case it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall be entitled to have final judgment entered forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of any amount levied, or any part thereof, into court by the bailiff, the taxation of costs, or otherwise, as the judge may think fit; and the defendant may be allowed to defend as to the residue of the plaintiff's claim.

(5) If it appears to the Judge that any defendant has a good defence, or ought to be permitted to defend, and that any other defendant has not such defence, and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to have final judgment entered against the latter, and may issue execution upon the judgment without prejudice to his right to proceed with his action against the former.

(6) Leave to defend may be given unconditionally, or subject to such terms as to giving security or otherwise, as the Judge may think fit.

(7) Nothing in this section contained shall

apply to any action in which the amount of the debt or claim sought to be recovered does not exceed \$40. 48 V. c. 14, s. 4 (1-7).

Leave to
dispute
claim at
any time
before
judg-
ment.

112. (h) The Judge, at any time before judgment actually entered, although the time for giving the notice disputing the plaintiff's claim has expired, may, on sufficient grounds shewn, and on such terms as he thinks just, grant leave to the defendant to dispute the plaintiff's claim, in which case the requisite notice disputing the claim shall immediately be left with the clerk, and also sent to the plaintiff, by prepaid letter through the post or otherwise. R. S. O. 1877, c. 47, s. 80.

With-
drawal of
defence.

113. (i) A defendant who has filed a notice of defence in any action may, by notice in

applicable, will be found at the pages mentioned of the work above referred to.

(h) Sinclair's D. C. Act, 1879, 103.

This is a Section frequently resorted to. The Clerk having no power to receive a notice disputing the plaintiff's claim after the eight days, the only remedy which the defendant has where he has not filed such notice is to apply to the Judge under this Section.

At page 102 of Sinclair's D. C. Act, 1879, the writer there hazarded the opinion that where judgment had not been signed, a Judge had power to grant leave to the defendant under this Section without the opposite party being called before him. Whether the view then expressed was right or wrong, the writer, after nine years' experience of its application, has to express the opinion that generally no injustice is done in pursuing that course.

As to when the time for giving the notice has expired, the opinion of the writer will be found at pages 101 and 102 of Sinclair's D. C. Act, 1879.

The words, "may on sufficient grounds shewn," do not mean that the Judge has an arbitrary power in respect to entertaining this application. He must do so. It is imperative, not simply discretionary on his part to hear it: *Macdonnell v. Paterson*, 11 C. B., 755; Sinclair's D. C., Law, 1884, 64-69.

Where the Judge grants leave under this Section, the requisite notice disputing the claim should "immediately" be left with the Clerk, and in addition the to a copy must be sent to the plaintiff by prepaid letter through the post or otherwise. It is the defendant's duty to send this letter, not that of the Clerk.

A party is not bound by an unauthorized appearance: 1 Western Rep., 626.

Appearing to object to a proceeding does not waive its irregularity: 1 Western Rep., 163.

(f) Sinclair's D. C. Act, 1886, 71.

The views of the writer upon this Section will be found at length on pages

writing to the clerk, at least six days before the sittings at which the same may be tried, withdraw such defence, and consent that judgment may be entered against him for any amount, and the clerk shall immediately notify the plaintiff thereof by mail, and thereupon the plaintiff shall be entitled to have judgment entered by the clerk as by default for such amount, and the costs necessarily incurred. 49 V. c. 15, s. 20.

Trial.

114. (j) In cases in which a trial is to be had, the defendant shall, on the day named in the summons, either in person or by some person on his behalf, appear in the court to answer, and, on answer being made, the Judge shall, without further pleading or formal joinder of issue, proceed, in a summary way, to try the cause and give judgment; and in case satisfactory proof is not given to the Judge entitling either party to judgment, he may nonsuit the plaintiff; and the plaintiff may, before verdict in jury cases, and before judgment pronounced in other cases, insist on being nonsuited. R. S. O. 1877, c. 47, s. 81.

Judge may summarily dispose of cause or nonsuit plaintiff.

71 and 72 of Sinclair's D. C. Act, 1886. It is not necessary here to repeat them. The six days mentioned within which the notice in writing of withdrawal of defence must be given to the Clerk are *clear days*; that is, the day of giving notice to the Clerk and the day of the Court are excluded from computation. Should the plaintiff be put to expense before the notice reaches him, he would have to bear the same himself, because it is the defendant's right to withdraw his defence within the prescribed time and any proceedings taken after such withdrawal and the notice prescribed by the Section would be at the plaintiff's risk.

(j) Sinclair's D. C. Act, 1879, 103, 105.

Little need be said on this Section beyond the language which is used at the pages of the work we have referred to. The law of nonsuit in the Division Court appears to exist in the same manner as it was before the Ont. J. Act. Under the Division Courts Act the better opinion seems to be, in which the writer concurs, that a nonsuit does not bar any future action for the same

Order in
which
actions to
be tried.

115. (k) The clerk shall place all actions in which the sum sought to be recovered exceeds \$100 at the foot of the trial list, and the other actions on the list and business of the court shall be disposed of before entering upon the trial of any of the first mentioned actions, unless the Judge shall, for special reason or reasons, otherwise order: the Judge shall, in such cases, when no agreement not to appeal has been signed and filed, take down the evidence in writing, and shall leave the same with the clerk of the court but in the event of an application for a new trial it shall be forwarded to the Judge by the clerk for the purposes of such application. 43 V. c. 8, s. 5.

Evidence
to be
taken
down.

cause, and that the rights of parties exist in respect to the subject matter of the suit, just the same as before the passing of the Ontario Judicature Act.

In respect to the law of nonsuit we refer to the following works and authorities: R. & J., 2595; Ont. Digest, 1884, 508; Ont. Digest, 1887, 476; 5 Mews' Digest, 782; Waterman on Set-off, 2nd Ed., 757, and pages there referred to; Hilliard on New Trials, 2nd Ed., (U. S.), 820 and pages there referred to; Sinclair's D. C. Law, 1884, 96, 114; Sinclair's D. C. Law, 1885, 145; Clarke v. McDonald, 4 Ont. R., 310. See also the cases of Bank of Ottawa v. McLaughlin, 8 App. R., 543; Dublin, Wicklow and Wexford Ry. Co. v. Slaterry, 3 App. Cas., 1155. At page 105 of Sinclair's D. C. Act, 1879, the following may be cited: The Metropolitan Ry. Co. v. Wright, 11 App. Cas., 152; The Canada Central Ry. Co. v. McLaren, 8 App. R., 568; The Can. Mutual Life Insurance Co. v. Moore, 6 App. Cas., 656; McMillan v. G. T. Ry. Co., 12 Ont. R., 103; Webster v. Friedeberg, 17 Q. B. D., 736; Solomon v. Bitton, 8 Q. B. D., 176; The Metropolitan Ry. Co. v. Jackson, 3 App. Cas., 193; Jones v. The G. T. Ry. Co., 45 U. C. R., 193. See also p. 108, *ante*.

(k) Sinclair's D. C. Act, 1880, 13, 14.

This Section requires the Judge to take down the evidence in writing. However proper it would be for such to be done, yet if the Judge accidentally omitted to do so we do not think it would invalidate the trial of the cause: 2 Mews' Digest, 1487, and following pages.

It would be the province of the Appellate Court to dispense with the Judge's notes: Morgan v. Davies, 3 C. P. D., 260.

It is submitted that it could be heard on *viva voce* evidence: "The Confidence," - The Susan Elizabeth, 40 L. T. N. S., 201.

The judgment of the Division Court might be upheld on Appeal on other grounds than those on which it proceeded: Chapman v. Knight, 5 C. I. D., 308.

116. (l) No appeal shall lie to the Court of Appeal if before the court opens, or if without the intervention of the Judge before the commencement of the trial, there shall be filed with the clerk, in any case, an agreement in writing not to appeal, signed by both parties, or their solicitors or agents, and the Judge shall note in his minutes whether such agreement was so filed or not, and the minutes shall be conclusive evidence upon that point. 43 V. c. 8, s. 6.

Parties may agree not to appeal.

117. (m) If on the day named in the summons the defendant does not appear, or sufficiently excuse his absence, or if he neglects to answer, the Judge, on proof of due service of the summons and copy of the plaintiff's account, claim or demand, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the order, verdict or judgment thereupon shall be final and absolute, and as valid as if both parties had attended; and, except in tort or trespass, in case of the personal service of the summons and of detailed particulars of the plaintiff's claim, the Judge may, in his discretion, give judgment without further proof. R. S. O. 1877, c. 47, s. 82.

Proceedings in case defendant does not appear.

(l) Sinclair's D. C. Act, 1880, 14, 15.

The writer is still of the opinion expressed at page 15 of the work above referred to—that the parties might waive the "agreement in writing" not to appeal: See Add. on Con., 8th Ed., 1188. It is always better, however, that the consent should be in writing as the Section requires. It might save question or controversy afterwards.

(m) Sinclair's D. C. Act, 1879, 105, 106.

All authorities that we have been able to discover emphasize the expression on page 105 of the work above referred to—that the policy of the law is that there can be only one trial of a cause, and that a verdict or judgment should not be disturbed unless it clearly appears to be wrong. In addition to Hooper v. Christoe, 14 C. P., page 121, there referred to, the general principles upon which a new trial should be granted or the Court of Appeal should reverse the decision of a Division Court will be found expressed in Metropolitan Ry. Co.

Judge
may ad-
journ
hearing
of cause.

118. (n) In case the Judge thinks it conducive to the ends of justice, he may adjourn the hearing of any cause in order to permit either party to summon witnesses or to produce further proof, or to serve or give any notice necessary to enable the party to enter more fully into his case or defence, or for any other cause which the Judge thinks reasonable, upon such conditions as to the payment of costs and admission of evidence or other equitable terms, as to him seems meet. R. S. O. 1877, c. 47, s. 83.

Postpone-
ment of
trial.

119. (o) Where an action is being tried by a jury, the Judge, if he thinks it expedient for

v. Wright, 11 App. Cas., 152, 156; *Solomon v. Bitton*, 8 Q. B. D., 176; *Webster v. Friedeberg*, 17 Q. B. D., 736.

The principle of new trial appears to be that it should not be granted on the ground that the verdict or judgment is against the weight of evidence if the same was one which the Judge or jury, acting as reasonable men, could have found. It was remarked by Lord ESHER, Master of the Rolls, in the last case cited: "It is idle to say that in determining whether a verdict was against the weight of evidence you must not take into serious consideration the opinion of the Judge who tried the case. No one has ever said that his opinion is conclusive, but it is a matter to be taken into serious consideration." See also *ante*, p. 107.

Hilliard on New Trials, 2nd Ed., 1-64, and the notes to Section 146 hereto.

Where a counsel or agent made use of an unfair fact, it was held that a new trial was grantable: 34 Alb. L. J., 386.

(n) Sinclair's D. C. Act, 1879, 106, 107.

In addition to the cases which are cited in the pages above referred to, we have to refer to the following works and authorities: R. & J., 3815-3817; Ont. Digest, 1884, 766; Ont. Digest, 1887, 680; 5 Mews' Digest, 1909; Sinclair's D. C. Act, 1885, 206-209.

A Judge has a wide discretion under this Section and Rule 140 as to the power of adjournment, which should be judiciously exercised by him. At one time it was believed that the withdrawal of a juror operated as a legal determination of an action. That is not so. It is no determination except in this sense of the word: that unless something very special happens, the Court will hold the parties to their understanding and will stay any further proceedings in the action. That is the legal effect of withdrawing a juror, which stands upon no higher level, so far as its affecting the legal determination of the action is concerned, than the discharge of a jury under ordinary circumstances: *Thomas v. The Exeter Flying Post Co. (Ltd.)*, 18 Q. B. D., 822.

(o) Sinclair's D. C. Law, 1885, 206-210.

The views which the writer holds upon the language of this Section will be found expressed at the pages of the work above referred to. A Judge would

the interest of justice, may postpone or adjourn the trial for such time and upon such terms, if any, as he shall think fit. 48 V. c. 14, s. 10.

120. (p) Any person may appear at the trial or hearing of any cause, matter or proceeding as agent and advocate for any party to any such cause, matter or proceeding in the Division Courts. R. S. O. 1877, c. 47, s. 84.

All persons empowered to act as agents or advocates.

121. (q) The Judge or acting Judge may, wherever in his opinion justice appears to require it, prevent any person from appearing at the trial or hearing of any cause, matter or proceeding in the court, as agent and advocate for any party or parties to any such cause, matter or proceeding. R. S. O. 1877, c. 47, s. 85.

Judge may prevent any one from acting as agent or advocate in certain cases.

Tender or Payment of Money into Court.

122. (r) If the defendant in an action of debt or contract brought against him in a Division Court, desires to plead a tender before action brought, of a sum of money in full satisfaction of the plaintiff's claim, he may do so on filing his plea with the clerk of the court

Plea of tender and payment of money into Court.

not have power under this Section or any other to impose costs by way of penalty upon either party: *Willmott v. Barber*, 17 Ch. D., 772.

A Judge would not have power to order that a defendant pay any part of the costs where he finds a judgment for him, nor should he declare that the costs be paid in certain proportions. *Idem*.

(p) *Sinclair's D. C. Act*, 1879, 107, 108.

An agent or attorney retained for the conduct of an action has not implied authority after judgment in favor of the client to enter into an agreement on his behalf to postpone execution: *Lovegrove v. White*, L. R., 6 C. P., 440.

As to the authority of an agent, solicitor or counsel under this Section, see R. & J., 314, 4257; *Ont. Digest*, 1884, 41; *Ont. Digest*, 1887, 645; 6 *Mews' Digest*, 1809.

(q) *Sinclair's D. C. Act*, 1879, 107, 108.

(r) *Sinclair's D. C. Act*, 1879, 108-113.

The subject matter of this Section will be found fully discussed at the pages cited of the above mentioned work.

before which he is summoned to appear, at least six days before the day appointed for the trial of the cause, and at the same time paying into court the amount of the money mentioned in the plea; and notice of the plea and payment shall be forthwith communicated by the clerk of the court to the plaintiff by post (on receiving the necessary postage), or by sending the same to his usual place of abode or business. R. S. O. 1877, c. 47, s. 86.

Amount
to be paid
to plain-
tiff, etc.

123. (s) The said money shall be paid to the plaintiff, less \$1 to be paid over to the defendant for his trouble, in case the plaintiff does not further prosecute his action; and all

This Section regulates the circumstances under which (and the mode of pleading) tender and payment into Court in Division Court causes.

Since the passing of the O. J. Act the law in regard to tender and payment into Court is somewhat altered in the High Court of Justice, but in the Division Court the law will be as understood before the passing of that Act.

In the case of *Demorest v. Midland Ry. Co.*, 10 P. R., 610, it was held, in an action to recover the value of land expropriated, that the defendants might plead a defence in denial, and also a tender of \$400 and interest, without paying the amount into Court. See also *Hawkesby v. Bradshaw*, 5 Q. B. D., 22. It is submitted that such could not be done in the Division Court.

As laid down in the pages above referred to, a tender to be good must be unconditional. In *Black v. Allan*, 17 C. P., 248, *RICHARDS, C. J.*, says: "As to tender, the later cases seem to lay it down where there is anything equivocal in the conduct of the party to whom the tender is made, it is a question of fact for the jury to decide whether the tender be absolute or conditional and whether the party dispenses with the production of the money or not."

In addition to the cases cited by the writer in the work of 1879 already referred to, the reader is referred to the following works: R. & J., 2736, 3733, 4661; *Danforth's (U. S.) Digest*, 1104; 7 *Mews' Digest*, 11; *Tobey v. Wilson*, 43 U. C. R., 230.

In *Conn v. The Merchants Bank of Canada*, 80 C. P., 380, it was held that a person receiving bank notes in payment of property or in exchange for cash or a deposit to the credit of the payer has the right, in case of the failure of the bank to return the notes, if he does so within a proper time after receipt.

As to tendering money to a clerk in an office, and where the Judges were equally divided in opinion as to the effect of it: See *Finch v. Boning*, 4 C. P. D., 143.

(s) *Sinclair's D. C. Act*, 1879, 1. 4.

Notwithstanding the restriction upon the plaintiff to signify to the Clerk of the Court his intention to proceed for his demand within three days after the receipt of notice of such payment, it is argued by some that the Judge of the Court has the power to extend the time. Some County Court Judges are of

proceedings in the action shall be stayed unless the plaintiff, within three days after the receipt of notice of the payment, signifies in writing to the clerk of the court his intention to proceed for his demand, notwithstanding such plea; and in such case the action shall proceed accordingly. R. S. O. 1877, c. 47, s. 87.

124. (t) If the decision thereon be for the defendant, the plaintiff shall pay the defendant his costs, charges and expenses, to be awarded by the court, and the amount thereof may be paid over to him out of the money so paid in with the said plea, or may be recovered from the plaintiff in the same manner as any other money payable under a judgment of the court; but, if the decision be in favour of the plaintiff, the full amount of the money paid into court as aforesaid shall be applied to the satisfaction of his claim, and a judgment may be pronounced against the defendant for the balance due and the costs of suit according to the usual practice of the court in other cases. R. S. O. 1877, c. 47, s. 88.

Rule as to
costs in
such
cases.

the opinion that he possesses this power. The writer, at the page above referred to, has expressed the opinion that the Judge has not. Until the point is authoritatively decided we must say that the question is open to much doubt. But in support of the opinion expressed in the work referred to see Greaves v. Fleming, 4 Q. B. D., 226; Wheeler v. Gibbs, 3 Sup. R., 374.

A plaintiff cannot get money paid into Court out until the suit in which it is paid in is determined, unless the Judge otherwise orders. This is governed by Rule 130 of the Division Court Rules. In the High Court the law is thus stated: "Where money has been paid into Court for a specific purpose, and that purpose has been answered in favor of the party paying it in, it would be ordered to be paid out to that party." McLaren v. Caldwell, 9 P. R., 118; see Johnston v. Johnston, 9 P. R., 259.

(t) Sinclair's D. C. Act, 1879, 114, 115.

If the decision of the question on a plea of tender be for the defendant, there is no discretion as to costs—the Statute arbitrarily determines how they shall be awarded by the Court. But if the decision be in favor of the plaintiff, the full amount of the money paid into Court shall be applied to the satisfaction of

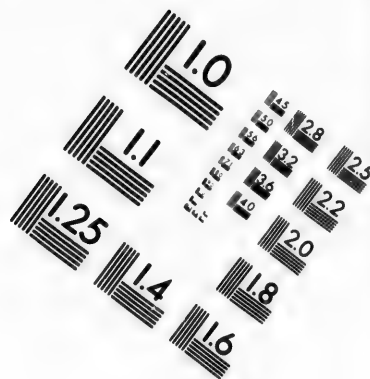
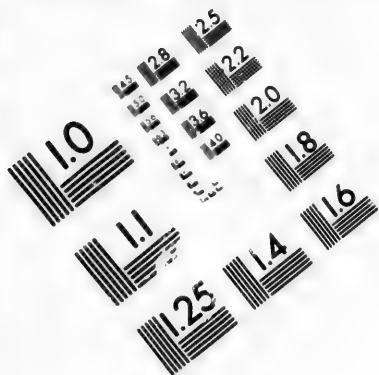


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Defendant may pay money into Court.

125. (u) The defendant may at any time, not less than six days before the day appointed for the trial, pay into court such sum as he thinks a full satisfaction for the plaintiff's demand, together with the plaintiff's costs up to the time of such payment. R. S. O. 1877, c. 47, s. 89.

Clerk to give notice of payment to plaintiff.

126. (v) The clerk having received the necessary postage, shall forthwith send notice of the payment to the plaintiff by post or otherwise to his usual place of abode or of business, and the sum so paid shall be paid to the plaintiff, and all proceedings in the action stayed, unless within three days after the receipt of the notice the plaintiff signifies in

his claim, and the Judge may pronounce judgment against the defendant for the balance due and the costs of the suit, according to the usual practice. In the notes to the work referred to at page 115, after the case of *Howes v. Barber*, 18 Q. B., 588, the reader is referred to *Fox v. Toronto & Nipissing Ry. Co.*, 7 P. R., 157. See Section 207.

(u) *Sinclair's D. C. Act*, 1879, 115, 116.

This Section regulates the manner of paying money into Court in satisfaction of the plaintiff's demand. The defendant must also at the time of such payment into Court include the amount of the plaintiff's costs up to the time of payment. The manner of paying money into Court on a money demand is so well known that further remark thereon need not be made. At the pages above mentioned it will be seen that the writer expresses the view that payment into Court might possibly be pleadable in any form of action in the Division Court, whether to recover a debt or for unliquidated damages or in personal actions. In looking carefully at this group of Sections (122-127) it is exceedingly doubtful if such is the correct view to take of it. The defence of tender and payment into Court appear to be grouped together, and to refer to the same class of actions, namely "debt or contract," as expressed in Section 122. It requires Statutory enactment to get over the effect of the plea of payment into Court as an admission of the cause of action in the High Court. The rights of a defendant as to payment into Court are enlarged by the *Judicature Act*: *Langridge v. Campbell*, 2 Ex. D., 281; *Buckton v. Higgs*, 4 Ex. D., 174; *Greaves v. Fleming*, 4 Q. B. D., 226. But that Act only applies by express provision to Division Courts: *Bank of Ottawa v. McLaughlin*, 8 App. R., 543; *Clarke v. Macdonald*, 4 Ont. R., 310. In this case there is no express Statutory provision on the subject. We trust that ere long the Rules of Practice in this respect may be assimilated in all Courts: See *Taylor on Ev.*, 8th Ed., 716, 717.

(v) On the subject of payment into Court generally, see *Sinclair's D. C. Act*, 1879, 116-117, 267, 268; *Division Court Rules* 129, 130; *R. & J.*, 2781, 4661;

writing to the clerk his intention to proceed for the remainder of the demand claimed, in which case the action shall proceed as if brought originally for such remainder only. R. S. O. 1877, c. 47, s. 90.

127. (w) If the plaintiff recovers no further sum in the action than the sum paid into court, the plaintiff shall pay the defendant all costs, charges and expenses incurred by him in the action after such payment, and such costs, charges and expenses shall be duly taxed, and may be recovered by the defendant by the same means as any other sum ordered to be paid by the court. R. S. O. 1877, c. 47, s. 91.

Plaintiff to pay defendant's costs if no further sum recovered.

Set-off and Statutory Defences.

128. (x) In case the defendant desires to avail himself of the law of set-off, or of the Statute of Limitations, or of any defence under any other statute having force of law in Ontario, he shall, at least six days before the

Defendant to give notice of set-off or other statutory defence.

Ont. Digest, 1884, 588 ; Ont. Digest, 1887, 519 ; 5 Mews' Digest, 1707, 1731 ; notes to Section 125.

(w) Sinclair's D. C. Act, 1879, 117.

In the case of payment into Court, the plaintiff, if he fails to recover any further sum, is obliged to pay the defendant all costs, charges and expenses incurred by him in the action after such payment, and provision is made for the same being duly taxed and recovered in the same manner as any other sum ordered to be paid by the Court. The plaintiff is, of course, entitled to his costs up to the time of payment into Court.

(x) Sinclair's D. C. Act, 1879, 117-122 ; Division Court Rules Nos. 127-129.

Where a defendant desires to avail himself of the law of Set-off or the Statute of Limitations, or of any defence under any other Statute having the force of law in this Province, provision is here made for it : Skirving v. Ross, 31 C. P., 423.

The particulars of Set-off must not only be delivered to the Clerk within the prescribed time, but must accompany the notice to be given to the plaintiff.

On the general question of Set-off see 6 Mews' Digest, 1042 ; R. & J., 3491, 4709 ; Ont. Digest, 1884, 731 ; Ont. Digest, 1887, 634 ; Mayne on Damages, 3rd Ed., 553, 554, and pages there cited ; Taylor on Evidence, 8th Ed., 1779 and pages there cited. After Cochrane v. Green, on the last line of Sinclair's

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trial or hearing, give notice thereof in writing to the plaintiff, or leave the same for him at his usual place of abode if within the division, or, if living without the division, shall deliver the same to the clerk of the court in which the action is to be tried; and in case of a set-off the particulars thereof shall be delivered to the clerk and shall accompany the notice to be given as aforesaid to the plaintiff. R. S. O. 1877, c. 47, s. 92.

Evidence
of set-off.

129. (y) No evidence of set-off shall be given by the defendant except such as is contained in the particulars of set-off delivered. R. S. O. 1877, c. 47, s. 93.

Provisions
if set-off
exceeds
amount
due to
plaintiff.

130. (z) If the set-off, proved to the satisfaction of the Judge, exceeds the amount shewn to be due to the plaintiff, the plaintiff shall be non-suited or the defendant may elect to have judgment for the excess, provided the

D. C. Act, 1879, p. 118, read *Agra and Masterman's Bank v. Leighton*, L. R., 2 Ex., 56; *Story's Equity Jurisprudence*, Sections 1430-1444.

Since Sinclair's D. C. Act, 1879, page 121, was written, the law regulating the stamping of promissory notes and bills of exchange has been repealed.

As to the power to double-stamp notes since that repeal, see *Bank of Ottawa v. McMorow*, 4 Ont. R., 345; *Bank of Ottawa v. McLaughlin*, 8 App. R., 543; *Baillie v. Dickson*, 7 App. R., 759; *Sinclair's D. C. Law*, 1884, 275 and pages there referred to; *Sinclair's D. C. Law*, 1885, 37, 261; *Sinclair's D. C. Act*, 1886, 41.

As to defence under the Statute of Limitations, see *Sinclair's D. C. Act*, 1886, 147, 148 and pages there referred to.

(y) *Sinclair's D. C. Act*, 1879, 122.

It will be observed from this Section that the defendant in his evidence is confined to the particulars of Set-off delivered. The Judge has, of course, the power of amendment.

(z) *Sinclair's D. C. Act*, 1880, 88.

This Section was passed before the law of Counter-claim was adopted in the Division Court. It would seem, therefore, not to apply to that defence. If the Set-off is proved to exceed the amount shewn to be due the plaintiff, the latter should be non-suited, or the defendant may elect for judgment for the excess, provided the excess be an amount within the jurisdiction of the Court; but if the excess be greater in amount than the jurisdiction, the Judge may so direct that an amount of the Set-off equal to the amount shewn to be due the plaintiff

excess be an amount within the jurisdiction of the court, and if the excess be greater in amount than the jurisdiction of the court the Judge may adjudicate that an amount of the set-off equal to the amount shewn to be due to the plaintiff be satisfied by the claim but the adjudication shall be no bar to the recovery by the defendant in a subsequent action for the residue of the set-off. 43 V. c. 8, s. 55.

WITNESSES AND EVIDENCE.

Subpœnas.

131. (a) Any of the parties to an action may obtain, from the clerk of any Division Court in the county, a subpœna with or without a clause for the production of books, papers and writings, requiring any witness, resident within the Province or served with the subpœna therein, to attend at a specified court or place before the Judge, or any arbitrator appointed by him under the provision hereinafter contained, and the clerk, when requested by any party to an action, or his agent, shall give copies of such subpœna. R. S. O. 1877, c. 47, s. 95; 49 V. c. 15, s. 9.

Parties
may
obtain
subpœnas
from
Clerk.

be satisfied by the claim. The adjudication shall be no bar to the recovery by the defendant, in a subsequent action, for the residue of the Set-off.

The Section was passed to get over the difficulty created by the case of *Re Mead v. Creary*, 32 C. P., 1.

The cardinal difference between Set-off and Counter-claim is that a Set-off can only be set up as a liquidated claim for debt or demand due and existing at the commencement of the action; Counter-claim may be the subject of a separate cause of action arising wholly from an independent transaction and for unliquidated damages as well as for debt or demand in money: See *McLean v. Hamilton Street Ry. Co.*, 11 P. R., 193, and cases cited. It may arise subsequent to the commencement of the action.

(a) *Sinclair's D. C. Act*, 1879, 123, 125; *Sinclair's D. C. Act*, 1886, 24.

The only important change which has lately been made under this Section was that effected by the Act of 1886. The word "County" was struck out as to the residence of a witness to be subpœned, and the Division Court jurisdic-

Service of
subpœna,
by whom
made.

132. (b) Any number of names may be inserted in a subpœna, and service thereof may be made by any literate person, and proof of the due service thereof, together with the tender or payment of expenses, may be made by affidavit, and proof of service may be received by the Judge, either orally or by affidavit. R. S. O. 1877, c. 47, s. 96.

Penalty
for dis-
obeying
subpœna
or refus-
ing to be
sworn.

133. (c) Every person served with a copy of a subpœna either personally or at his usual place of abode, and to whom at the same time a tender of payment of his lawful expenses is made, who refuses or neglects without sufficient cause to obey the subpœna, and also every person in court called upon to give evidence, who refuses to be sworn (or affirm where affirmation is by law allowed) or to give evidence, shall pay such fine not exceeding \$8 as

tion of a subpœna was then, has been since, and is now, extended to the whole Province. It is not necessary now to issue a subpœna from the High Court of Justice in any Division Court suit where the party proposed to be subpœnaed resides within the Province.

(b) Sinclair's D. C. Act, 1885, 126.

As to the law regulating the subpœnaing a witness, and the effect thereof, generally: See 12th Ed. Arch. Pract., 1924, and pages there cited; 3 Mew's Digest, 1386; R. & J., 1309, 1332, 4465; Ont. Digest, 1884, 240; Ont. Digest, 1887, 220; Lush's Pract., 1180, and pages there referred to.

(c) Sinclair's D. C. Act, 1879, 126, 127.

The expression used in this Section "Every person served with a copy of a subpœna" applies either to male or female. It would not apply to a corporation, although it would apply to the individual members or officers of a corporation. The person who is subpœnaed must have tendered him, at the time of service or a reasonable time thereafter, his lawful expenses. Neglect or refusal without just cause to obey the subpœna would be punishable, as this Section directs. The service should be a reasonable time before the sittings, so as to allow the witness an opportunity of making preparation, either in his business affairs or otherwise, to attend Court. He would not be treated as in contempt did it appear that such was not done. It would appear at first blush that any person who happened to be in Court could be called upon to give evidence under this Section. It is not so. If a witness were subpœnaed by the opposite party, for instance, and was not paid his witness fees, but he attended Court notwithstanding, he could not be called upon to give evidence by the party who had not subpœnaed him, unless such witness fees should be first paid.

the Judge may impose, and shall, by verbal or written order of the Judge, be, in addition, liable to imprisonment for any time not exceeding ten days; and the fine shall be levied and collected with costs, in the same manner as fines imposed on jurymen for non-attendance, and the whole or any part of the fine, in the discretion of the Judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall form part of the Consolidated Revenue Fund. R. S. O. 1877, c. 47, s. 97.

134. (d) Any person served with such subpoena, who is resident in Ontario, but out of the county in which the Division Court is situate, shall be entitled to be paid witness

Expenses
to be paid
witness
out of
county.

It will be observed that the fine for contempt under this Section is not to exceed \$8.00. The contempt may be imposed by verbal or written order. In addition to the pecuniary penalty, imprisonment might be imposed for a time, not exceeding ten days. The amount of fine imposed may, in the discretion of the Judge, after deducting the costs, be made applicable towards indemnifying the party injured by such neglect or refusal. The remainder, if any, would belong to the Consolidated Revenue Fund of the Province.

(d) Sinclair's D. C. Act, 1886, 25-28.

The allowance to witness, according to the County Court Tariff, is as follows:

To Witnesses residing within three miles of the Court House, per diem.....	\$1 00
To Witnesses residing over three miles from the Court House.....	1 25
Barristers and Attorneys, Physicians and Surgeons, when called upon to give evidence in consequence of any professional service rendered by them, or to give professional opinions, per diem.....	4 00
Engineers and Surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem.....	4 00
If the Witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause, they will be entitled to a proportionate part in each cause only.....	
The travelling expenses of Witnesses over ten miles shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile, one way.....	

fees and mileage according to the County Court tariff. 49 V. c. 15, s. 10.

Commissions to take Evidence.

Power to
issue
com-
mis-
sions to
take evi-
dence.

135. (e) In case the plaintiff or defendant in an action in a Division Court is desirous of having at the trial thereof the testimony of a person residing without the limits of the Province, the Judge of the County Court of the county wherein the action is pending, may, upon the application of the plaintiff or defendant, and upon hearing the parties, order the issue of a commission out of and under the seal of the County Court to a commissioner to take the examination of such person. R. S. O. 1877, c. 47, s. 99.

When
com-
mis-
sion to
take evi-
dence of
applicant,
etc., may
be
granted.

136. (f) No order shall be made for the issue of such commission for the taking of the evidence of the person applying therefor, or any person in his employment, unless in the opinion of the Judge a saving of expense will

The writer sees no reason why a witness residing out of the County, and who comes, at the request of a party and without the compulsion of a subpoena, to attend the trial of an action in the Division Court, should not be entitled to have his witness fees allowed him on the County Court scale, and the same by the party at whose instance he came, taxed against the opposite party, just the same as if he had been subpoenaed. The answer in the negative is to be found in the narrow language of the Section.

The opinion of the writer upon this Section will be found expressed at the pages referred to of the work just cited.

(e) Sinclair's D. C. Act, 1879, 128, 131.

The reader is referred to the law relative to Commissions to take evidence, to Arch. Pract. 12th Ed., 1848, 1849, and pages there referred to; 3 Mews' Digest, 1465; R. & J., 1317, 4468; Ont. Digest, 1884, 244; Ont. Digest, 1887, 224.

If certain evidence is received on Commission without objection and returned with the Commission, it cannot be objected to on the trial that it was inadmissible: *Robinson v. Davies*, 5 Q. B. D., 26.

A Commission will not be issued to take *ex parte* testimony: *Bingham v. Henry*, 19 L. J. N. S., 223.

(f) Sinclair's D. C. Act, 1879, 132.

The law relating to taking evidence by Commission in Division Court causes

be caused thereby, or unless it is clearly made to appear that the person is aged, infirm, or unable from sickness to appear as a witness. R. S. O. 1877, c. 47, s. 100.

137. (c) In case it be made to appear to the Judge that a material and necessary witness residing within the Province is sick, aged, or infirm, or that he is about to leave the Province, and that his attendance at Court as a witness cannot by reason thereof be procured, the Judge may make an order appointing a suitable person to take the evidence of the said person. A copy of the order, with two days' notice of the time, and place of the examination shall be served upon the opposite party, his solicitor or agent, who may appear, and cross examine the witness. The evidence shall be taken on oath, and shall be reduced to writing, and signed by the witness, and shall be transmitted to the clerk of the Court, and shall be by him kept on file, and may be used upon the trial saving all just exceptions. The costs of the order shall be in the discretion of the Judge, and the reasonable charge of the examiner (to be fixed by the Judge) shall, in the first instance be paid by the party obtaining the order, as in the case of witness fees, and shall thereafter be paid as the Judge may order. 49 V. c. 15, s. 18.

Examination of witnesses whose attendance at trial cannot be obtained.

does not favor the taking of such evidence of the person applying for the same or of any person in his employment. If, however, in the opinion of the Judge, a saving of expense would be caused by taking such evidence, the Commission may be allowed. Should the person sought to be examined be aged, infirm, or unable from sickness to appear as a witness, the Commission would also be ordered.

See also next Section.

(g) Sinclair's D. C. Act, 1886, 57-67.

The principles of law applicable to the making of an order for the examination of a party under the Section in question, and the Forms in regard to the

Examina-
tion of
witness
residing
at a dis-
tance
from
place of
trial.

138. (h) (1) An order may also be obtained for the examination of a witness who resides in a remote part of the Province; and at a great distance from the place of trial, if it be clearly made to appear that his attendance cannot be procured, or that the expense of his attendance would be out of proportion to the amount involved in the action, or would be so great that the party desiring his attendance should not, under the circumstances, be required to incur the same; and the proceedings thereon, and the order as to costs, shall be the same as in the case of an order in the next preceding section mentioned.

(2) The person appointed under this and the next preceding section shall have authority to administer an oath to the person to be examined. 49 V. c. 15, s. 19.

Rules
made ap-
plicable
to com-
missions.

139. (i) The provisions of the Rules of the Supreme Court of Judicature, so far as the same are applicable, shall apply to every commission issued under the authority of this Act. R. S. O. 1877, c. 47, s. 101.

Return of
commis-
sion.

140. (j) The commission, when returned, shall with the evidence taken thereunder, and

same, will be found in the pages of the work above referred to. As the remarks of the writer concerning that Section are there given at length, they are not repeated here.

(h) Sinclair's D. C. Act, 1886, 68-70.

Reference is simply made to the pages of that Act where the views of the writer will be found fully expressed.

(i) Sinclair's D. C. Act, 1879, 132.

The Section in question only declares that Commissions issued under the authority of the Division Courts Act shall be governed by the Rules of the Supreme Court of Judicature. This would not apply to the next two previous Sections.

(j) This Section merely provides to whom the Commission shall be returned. Provision is made that on receipt by the Clerk of the County Court all evidence

the papers returned therewith by the commissioner, be forthwith transmitted by the clerk of the County Court to the clerk of the Division Court in which the action to which the same relates is pending. R. S. O. 1877, c. 47, s. 102.

141. (k) The costs of and attending the application for the issue, execution, return and transmission of such commission shall be in the discretion of the court in which the action is pending, and shall be taxed on the County Court scale by the clerk of the County Court out of which the same issued on notice to all parties interested, and the clerk shall certify the result of the taxation accompanied by a copy of the bill of costs as taxed, to the clerk of the Division Court in which the action is pending; and the costs may be added to any other costs to be paid to the party entitled thereto, and may be recovered by the party entitled thereto in like manner as the ordinary costs of the action are recoverable by the practice of the Division Courts. R. S. O. 1877, c. 47, s. 103.

Costs of
commis-
sion.

Books of Account, Affidavits, etc., as evidence.

142. (l) In an action for a debt or demand, not being for tort, and not exceeding \$20, the

Judge
may
receive in

taken and all papers shall be transmitted to the Clerk of the Division Court in which the action is pending.

(k) This Section merely makes provision for the costs of attending the application for the issue, execution, return and transmission of the Commission.

Such costs shall be in the discretion of the Court in which the action is pending, and shall be taxed on the County Court scale by the Clerk of the County Court out of which the Commission issued, who shall give a certificate for same. These costs may be added to any other costs to be paid to the party entitled to the same, and may be recovered in the usual way. As a general rule such costs are ordered to be costs in the cause.

(l) Sinclair's D. C. Act, 1879, 133, 134.

evidence
plaintiff's
or defend-
ant's
books of
account.

Judge, on being satisfied of their general correctness, may receive the plaintiff's books as evidence, or in case of a defence of set-off or of payment, so far as the same extends to \$20, may receive the defendant's books as evidence, and the Judge may also receive as evidence the affidavit or affirmation of any party or witness in the action resident without the limits of his county, but, before pronouncing judgment, the Judge may require such witness or any party in a cause to answer upon oath or affirmation any interrogatories that may be filed in the action. R. S. O. 1877, c. 47, s. 104.

Affidavits
may be
sworn
before a
Judge,
Clerk, etc.

143. (m) All affidavits to be used in Division Courts or before any of the Judges thereof, may be sworn before a County Judge or before the Clerk or Deputy Clerk of a Division Court, or before a Judge, Notary Public or Commissioner for taking affidavits in the High Court. R. S. O. 1877, c. 47, s. 105; 48 V. c. 16, s. 1.

JUDGE'S DECISION.

Judge
may give
judgment
instantly,
or post-
pone
judg-
ment.

144. (n) The Judge in any case heard before him shall, openly in court and as soon as may be after the hearing, pronounce his decision; but if he is not prepared to pronounce a decision instantly, he may postpone judgment and name a subsequent day and

On referring to the pages cited of the above work, the reader will find the views of the writer there expressed.

(m) This Section expresses the different persons who only have the right to take affidavits to be used in Division Courts. All affidavits taken by persons other than those mentioned in this Section would be void.

(n) Sinclair's D. C. Act, 1879, 134-137.

As to the meaning of the word "decision": See *Danjon v. Marquis*, 3 Sup. R., 251.

Decision here means the judicial disposal of the case which the Judge has

hour for the delivery thereof in writing at the clerk's office; and the clerk shall then read the decision to the parties or their agents, if present, and he shall forthwith enter the judgment, and such judgment shall be as effectual as if rendered in court at the trial. R. S. O. 1877, c. 47, s. 106.

145. (o) The Judge may order the time or times and the proportions in which any sum and costs recovered by judgment of the court shall be paid, reference being had to the day on which the summons was served, and at the request of the party entitled thereto, he may order the same to be paid into court, and the Judge, upon the application of either party

Judge may direct times and proportions in which judgment shall be paid.

heard. The Legislature has evidently taken the same view as JESSEL, L. J., did—"that a Judge's decision is best when the facts are fresh in his mind"—by declaring that he should pronounce a decision in a case tried before him *instantly*. We have to express the opinion upon the necessity of the Judge giving his decision when he reserves judgment at the time appointed by him. The necessity for so doing will appear from recent decisions.

As to the law relating to interest, (in addition to what has been said at the pages of above work) it will be found at *ante* page 102.

The general rule deducible from the latest case of *St. John v. Rykert*, 10 Sup. R., 278, is that the security bears interest until it matures at the rate specified, but after maturity only by way of damages, which are usually assessed at the legal rate of six per cent.

In the case just cited, at page 288 of the Report, it was held that these words, "The said sum of \$3,000 on the 11th day of July, 1862, with interest at the rate of 24 per centum per annum until paid," meant with interest at the specified rate up to the 11th of July, 1862, the day fixed for payment by the terms of the covenant, and that it was not to be interpreted as a covenant for payment of interest at the rate of 24 per cent. after the 11th July, if the principal should then remain unpaid. It will thus be seen that the words "until paid" here were by the Supreme Court of Canada virtually interpreted as "until payable."

(o) *Sinclair's D. C. Act*, 1879, 138, 139.

This Section authorizes the Judge to order at what time or times and the proportions in which any sum of money and costs recovered by the judgment of the Court shall be paid.

The power to grant a new trial within fourteen days after the trial upon good ground shewn is also given by this Section.

As to the grounds upon which a new trial will be granted, the reader is referred to pages 138-140 of the work already referred to, and page 107 *hereto*.

within fourteen days after the trial, and upon good grounds being shewn, may grant a new trial upon such terms as he thinks reasonable, and in the meantime may stay proceedings. R. S. O. 1877, c. 47, s. 107.

Judgment in applications for new trials, and on appeals.

146. (p) Upon an application for a new trial the Judge, instead of granting a new trial, may pronounce the judgment which in his opinion ought to have been pronounced at the trial, and may order judgment to be entered accordingly. 47 V. c. 10, s. 10 (4).

(p) Sinclair's D. C. Law, 1884, 58-74; Sinclair's D. C. Act, 1879, 138-140.

The rule of law is that there shall be only one trial in any cause unless for good reasons shewn it appears that some miscarriage of justice would ensue unless a new trial is granted: *Jenkins v. Morris*, 14 Ch. D., 684.

A new trial is only granted in cases wherein on the first trial either in law or fact such miscarriage has taken place. It is impossible to say, except in a general way, when a new trial will be granted. The particular circumstances of each case and the law applicable to it must determine what, in the mind of the Judge, should justify him in granting a new trial. Where a case is tried by a jury, and the matter is determined by them, particularly one within their own province, a new trial should not be granted unless it appears that the jury has clearly made a mistake. It is not sufficient that a Judge would have found the other way, or that his opinion is at variance with the decision of the jury, but it must appear that the jury has come to a decision which is clearly wrong: *Sinclair's D. C. Law*, 1884, 63; *Hooper v. Christoe*, 14 C. P., 117; *Con. Mutual Life Ins. Co. of Hartford v. Moore*, 6 App. Cas., 644; *Duffett v. McEvoy*, 10 App. Cas., 301; *Metropolitan Ry. Co. v. Wright*, 11 App. Cas., 152; *Canada Central Ry. Co. v. McLaren*, 8 App. R., 564; *Scribner v. McLaren*, 2 Ont. R., 265, 277; *Genereux v. Cuthbert*, 20 L. J. N. S., 172; *Webster v. Friedeberg*, 17 Q. B. D., 736; *Arthur v. Lier*, 8 C. P., 181; *Stevenson v. Rae*, 2 C. P. 406; *Creighton v. Chambers*, 6 C. P., 282; *Doe dem. McQueen v. McQueen*, 9 U. C. R., 576.

In addition to the cases cited at pages 138 to 140 of Sinclair's D. C. Act, 1879, the following may be referred to: *Solomon v. Bitton*, 8 Q. B. D., 176, and *Webster v. Friedeberg*, 17 Q. B. D., 736.

It has been repeatedly held in our Courts that the application for new trial must be made within the prescribed time, and that Prohibition will lie against a Judge of the Division Court from in any way interfering in a case after such time. In *Bell v. Lamont*, 7 P. R., 307, it was held that a proceeding upon an order for the revision of costs was too late after the expiration of fourteen days from the judgment. See also *Re Foley v. Moran*, 11 P. R., 316.

It would appear from the decisions of *Watt v. Barnett*, 3 Q. B. D., 188, and *King v. Davenport*, 4 Q. B. D., 402, that the view which has been repeatedly expressed in our Courts as to the time within which a new trial should be made has been similarly recognized in England. See also *Dagnino v. Bellotti*, 11 App. Cas., 604; *Ont. Digest*, 1884, 498; *Doria & MacRae's Bankruptcy*, 318; *Irving v. Askew*, L. R., 5 Q. B., 208.

147. (q) Except in cases where a new trial is granted, the issue of execution shall not be postponed for more than fifty days from service of the summons without the consent of the party entitled to the same, but in case it at any time appears to the satisfaction of the Judge, by affidavit, affirmation or otherwise, that a defendant is unable, from sickness or other sufficient cause, to pay and discharge the debt or damages recovered against him, or any instalment thereof, ordered to be paid as aforesaid, the Judge may suspend or stay any judgment, order or execution given, made or issued in the action, for such time and on such terms as he thinks fit, and so from time to time until it appears by the like proof that the temporary cause of disability has ceased. R. S. O. 1877, c. 47, s. 108.

Execu-
tion not
to be post-
poned for
more
than 50
days.

An application for new trial must show the grounds upon which it is founded: *Moore v. Hicks*, 6 U. C. R., 27; *Vidal v. Bank of Upper Canada*, 24 U. C. R., 430.

It will therefore be seen that a defeated party has no right to obtain a new trial unless he shews that a miscarriage of justice has occurred either as to law or fact. See also *Hilliard on New Trials*.

(q) *Sinclair's D. C. Act*, 1879, 139, 140.

It will be observed that the issue of execution cannot be postponed by the Judge for more than fifty days from the service of summons without the consent of the party who is entitled to the same.

It was said by *ROBINSON, C. J.*, in *Hales v. Tracey*, 1 U. C. R., 542, that "Execution is regarded in law as one act, and if it is rightly commenced may be carried to an end."

The expression "*feri facias*" and "warrant of execution" used in the Division Courts are convertible terms. They have the same meaning: *Macfie v. Hunter*, 9 P. R., 149.

Under the tariff of fees existing in the Division Courts there cannot be much question as to the poundage which a Bailiff is entitled to; but in the case of *Re Ludmore*, 13 Q. B. D., 415, it was held that when the bankruptcy of the judgment debtor supervened after seizure but before sale by a Sheriff under a writ of *fi. fa.*, the Sheriff was not entitled to poundage under the words "costs of execution."

Execution may be amended so as to make it conform to the judgment: *Glass v. Cameron*, 9 O. R., 712.

The rule in the United States is the same as ours, that in order to entitle a

APPEALS.

Appeal.

148. (r) (1) In case a party to a cause, wherein the sum in dispute upon the appeal exceeds \$100 exclusive of costs, is dissatisfied with the decision of the Judge, upon an application for a new trial, he may appeal to the Court of Appeal, and in such case the proceedings in and about the appeal, and the giving and perfecting of the security, shall be the same as on an appeal from the County Court, except where otherwise provided by this Act, and the terms "party to a cause" and "appellant" in this section and hereafter used, shall have the meaning attached thereto in and by section 40 of *The County Courts Act*. 43 V. c. 8, s. 17.

Rev. Stat.
c. 47.

party to take the benefit of an objection to any proceeding on the trial of a case, he should appear and raise the objection before the Judge: 33 Albany Law Journal, 393.

It is also provided by this Section that in case it at any time appears to the satisfaction of the Judge, by affidavit, affirmation or otherwise, that the defendant is unable, from sickness or other sufficient cause, to pay and discharge the debt or damages recovered against him, or any instalment ordered to be paid, the Judge may suspend or stay any judgment order or execution against him or issued in the action, for such time and on such terms as he thinks fit, and so from time to time as it appears by like proof that the temporary disability has ceased: *Booth v. Walton*, 44 U. C. R., 497.

The writer has now to reiterate the opinion expressed at page 140 of Sinclair's D. C. Act, 1879, that a strong and clear case would have to be made out to justify the Judge in making this order.

Where there is a confusion of property seized under execution from a Division Court: See R. & J., 4359, and cases cited, and page 116, *ante*.

(r) Sinclair's D. C. Act, 1880, 36-44.

As to the meaning of the words "the sum in dispute," see "The Generous," L. R., 2 A. & E., 62.

This Section allowing appeals in the Division Court only applies to cases within the extended jurisdiction of the Division Court. It does not apply to cases within the original jurisdiction.

In addition to the work of the writer of 1880 already cited, we also refer to Sinclair's D. C. Law, 1884, 44-66; Sinclair's D. C. Law, 1885, 189-196.

Since the work of 1880 was written, several cases which may be of interest to the reader and explanatory of the principles upon which an Appeal is advisable have been decided.

It has been held in England that there cannot be an Appeal upon the question of costs merely: *Harpham v. Shacklock*, 19 Ch. D., 207, 215.

(2) An appeal shall also lie to the Court of Appeal from the decision of a Division Court Judge upon an application for a new trial in all actions in which the parties consent to an appeal, and in interpleader, where the money claimed, or the value of the goods or chattels claimed or of the proceeds thereof, exceeds \$100, or where the damages claimed by or awarded to either party against the other or against the bailiff, exceed the sum of \$60. 47 V. c. 10, s. 9; 48 V. c. 14, s. 7.

Appeal in Interpleader proceedings.

140. (s) A Judge of the County Court for the county in which the cause was tried, on the application of the person proposing to

Stay of proceedings.

But if there should be a disregard of principle or misapprehension of facts in an appealable cause, the writer submits that there could be an Appeal even where the question of costs merely arises: *In re Gilbert*. *Gilbert v. Hudlestone*, 28 Ch. D., 549; *The Atty.-Gen. v. The Metropolitan Ry. Co.*, 5 Ex. D., 226, *per* Corron, L. J.; *Metropolitan Asylum District v. Hill*, 5 App. Cas., 582; *Wansley v. Smallwood*, 11 App. R., 439.

It is submitted that there will be no Appeal against the reasonable exercise of the discretion of the Judge: *Goodes v. Cluff*, 13 Q. B. D., 694; *R. & J.*, 848; *Ont. Digest*, 1884, 166; *Ont. Digest*, 1887, 147.

In questions of Appeal we think that in order for a party to take the benefit of any point of law, objection should be taken before the Judge in the Court below: *Sinclair's D. C. Law*, 1884, 52, 71.

Should the Appeal not be within the proper time it would be proper to dismiss it: *W. N.*, 1887, 134. Or not observe other formalities prescribed by the Statute: *Williams v. The Mayor of Tenby*, 5 C. P. D., 135; 1 *Mews' Digest*, 149-160. The time would begin to run from the date even of a verbal order: *In re Manning*, 30 Ch. D., 480.

Upon the principles which Appeals will lie generally, reference may be made to the following cases: *Scott v. Dent*, 38 U. C. R., 30; *Ryan v. Ryan*, 5 Sup. R., 387; "*The Picton*," 4 Sup. R., 648; *Levi v. Reed*, 6 Sup. R., 482; *Côté v. Morgan*, 7 Sup. R., 1; *McCallum v. Odette*, 7 Sup. R., 36; *Gallagher v. Taylor*, 5 Sup. R., 368; *Hamilton v. Johnson*, 5 Q. B. D., 263; 34 *Alb. L. J.*, 74, 393; *Ont. Digest*, 1884, 11; *Wright v. Sanderson*, 9 P. D., 149; *Seaton v. Lunney*, 27 *Grant*, 172; *Silverthorn v. Hunter*, 5 App. R., 157; *Sinclair's D. C. Act*, 1880, 113-115 and pages mentioned; 1 *Mews' Digest*, 127-186, and page 83, *ante*; *Campbell v. Prince*, 5 App. R., 330.

(a) *Sinclair's D. C. Act*, 1880, 45-53.

In addition to the cases which are cited in the pages of the work already referred to, the reader is referred to the following authorities: *Wiltsey v. Ward*, 9 P. R., 216; *Re Bothwell Election Petition*, 9 P. R., 485; *Barker v. Palmer*, 8 Q. B. D., 9; *W. N.*, 1880, 38; *Ex parte Whitton*. *In re Greaves*, 13 Ch. D., 881; *Maxwell on Statutes*, 1st Ed., 7; *In re Ronald v Brussels*,

appeal, his counsel, solicitor or agent, shall stay the proceedings in the cause, for a time not exceeding ten days from the day of giving judgment on the application for a new trial, in order to afford the party time to give the security required to enable him to appeal. 43 V. c. 8, s. 18.

Agent for
service.

150. (z) Upon an application for a new trial in any cause wherein either party may appeal, each party shall leave with the Judge by whom the application is heard, a memorandum in writing of the name of some person resident within the county town of the county or united counties in which the cause was tried, with his place of abode, upon whom the notice of appeal, and all other papers thereafter requiring service, may be served for him, and service upon such person, or, in his absence, at his place of abode, shall be sufficient service thereof; and, in the event of failure to leave such memorandum by either party, all papers requiring service upon him may be served upon the clerk of the Division Court where the trial was had, or left at his office, for the person so failing to leave such memorandum, and such service shall be good service; the clerk shall, in such case, forthwith mail, by registered letter, all such papers so served upon him to the person entitled to the same. 43 V. c. 8, s. 19.

9 P. R., 232; *Grant v. Holland*, W. N., 1880, 156. The Judge would not have power to extend the time for appealing beyond the ten days mentioned in the Section. The day of giving judgment would be excluded: *Sinclair's D. C. Act*, 1880, 19. Sometimes the word "from" receives a different construction: *In re Bronson v. Ottawa*, 1 Ont. R., 415, but not in this case: *Ex parte Whitton*, *In re Greaves*, 13 Ch. D., 881.

(t) *Sinclair's D. C. Act*, 1880, 53, 54.

This Section makes provision for the service of the notice of Appeal. It has no importance otherwise.

151. (u) Upon the bond being approved by the Judge, or the deposit being paid into court, the clerk of the court in which the action or proceeding is pending, shall, at the request of the appellant, his counsel, solicitor, or agent, furnish a duly certified copy of the summons with all notices indorsed thereon, the claim, and any notice or notices of defence, and of the evidence and all objections and exceptions thereto, and of all motions or orders made, granted, or refused therein, together with such notes of the Judge's charge as have been made, the judgment or decision when in writing, or the notes thereof, and all affidavits filed or used in the cause, together with all other papers filed in the cause affecting the questions raised by the appeal; the clerk shall also furnish to the respondent, when required so to do, a duplicate copy of the proceedings so furnished to the appellant, or such portion thereof as may be required by him, and for every copy he shall be entitled to receive the sum of five cents per folio of one hundred words. 43 V. c. 8, s. 20.

Evidence,
etc., to be
certified.

152. (v) The appellant shall within two weeks after the approval of the security or deposit being paid into court, or at such other time as the Judge of the said County Court may by order in that behalf provide, file the said certified copy with the Registrar of the Court of Appeal, and shall thereupon forth-

Setting
down
appeals

(u) Sinclair's D. U. Act, 1880, 53. 54.

The Judge is required to approve of the bond under this Section. He cannot delegate the right to allow the bond: *Haskins v. St. Louis & S. E. Ry. Co.*, 106, U. S., 106. *Harrington v. Edison*, 11 U. C. R., 114. Nor can he arbitrarily decline to do so: *Young v. Brompton, &c.*, 1 B. & S., 675.

(v) Sinclair's D. C. Act, 1880, 55-58; Sinclair's D. C. Law, 1884, 58-74.

- Hearing. with set down the cause for argument before a Judge of the said Court of Appeal, and shall forthwith give notice thereof, and of the appeal, and of the grounds thereof, to the respondent, his counsel, solicitor, or agent, at least seven days before the day for which the same is set down for hearing, and the said appeal may be heard and disposed of by a single Judge of the Court of Appeal, and he shall have power to dismiss the appeal or give any judgment and make any order which ought to have been made, and he shall give such order or direction to the court below touching the decision or judgment to be given in the matter as the law requires, and shall also award costs to the party in his discretion, which costs shall be certified to and form part of the judgment of the court below, and upon receipt of such order, direction and certificate, the court below shall proceed in accordance therewith. 43 V. c. 8, s. 21; 47 V. c. 10, s. 10 (4).
- Costs.
- Taxable costs. **153.** (w) The costs taxable, as between party and party upon or connected with any appeal shall be the actual disbursements and no greater amount over and above actual disbursements than \$15, inclusive of counsel fees; the costs of such appeal, as between solicitor and client, shall be taxable on the county court scale: section 156 of *The Judicature Act* shall not apply to appeals made under this Act. 43 V. c. 8, s. 22.
- Rev Stat. c. 44.

(w) Sinclair's D. C. Act, 1880, 59, 60.

Should the Appeal be abandoned, it is submitted that the costs should be made payable by the party abandoning the Appeal: *Charlton v. Charlton*, 16 Ch. D., 273. A *pro forma* judgment cannot be appealed from: *W. N.*, 1887, 235.

JURIES.

154. (x) Either party may require a jury in tort or replevin where the sum or the value of the goods sought to be recovered exceeds \$20, and in all other cases where the amount sought to be recovered exceeds \$30. 43 V. c. 8, s. 43.

When a jury may be required.

155. (y) (1) Either party to an interpleader issue in a Division Court may require a jury to be summoned to try the issue and in such case he shall, within five days after the day of

Right to jury in interpleader.

(x) Sinclair's D. C. Act, 1880, 69, 70.

With reference to the subject of trial by jury and the findings of a jury, the writer refers to the notes to Section 146 hereof.

Some difficulty is often experienced in considering an application for a new trial where the question is whether the verdict was against the weight of evidence or not. On that subject the late Lord JESSEL said, in *Jenkins v. Morris*, 14 Ch. D., 684: "Recollecting that the verdicts of juries are not to be set aside capriciously by Courts of Justice, that they are of great weight and importance, and that we have here the concurrence of both those learned Judges (in the Court below) I have mentioned, and, as far as I am concerned, I cannot say that they were wrong in the conclusion to which they have come, although I am not quite sure that I myself should have arrived at the same conclusion—yet I think we ought not only to be satisfied that they are wrong, but that they are so manifestly and clearly wrong that there has been a miscarriage of justice, before we ought to expose the parties to the risk, delay and annoyance of a new trial." See also *Hamilton v. Johnson*, 5 Q. B. D., 263.

On the subject of the right to a jury, the reader is referred to Sinclair's D. C. Law, 1884, 57-74.

If a party has regularly demanded a jury the Judge cannot properly try the case without a jury: *Hamlyn v. Betteley*, 6 Q. B. D., 63; *Bank of British North America v. Eddy*, 9 P. R., 468.

In the High Court of Justice a jury notice will not be struck out unless for good cause shewn: *Clarke v. Cookson*, 2 Ch. D., 746; *West v. White*, 4 Ch. D., 631; *Bank of British North America v. Eddy*, 9 P. R., 468; *Jenkins v. Morris*, 14 Ch. D., 684.

The ordinary rule is that misdirection of the Judge must be complained of at the trial: *R. v. Wilkinson*, 42 U. C. R., 501; *Parsons v. The Queen Ins. Co.*, 43 U. C. R., 280; *Hilliard on New Trials*, 2nd Ed., 95; *Whitehouse v. Hemmant*, 3 H. & N., 945; *Danforth's (U. S.) Digest*, 768.

(y) Sinclair's D. C. Law, 1884, 57-74; Sinclair's D. C. Law, 1885, 304, 305, and pages there referred to.

For a further discussion of the subject the reader is referred to the pages of the works just cited. In addition to the views there expressed, we can only say that the right of a party in the Division Court to a jury strictly depends upon the observance of the prerequisites by the Statute prescribed.

service of the summons on him, give to the clerk or leave at his office notice in writing, requiring a jury, and shall at the same time pay to the clerk the proper fees for the expenses of the jury, and thereupon a jury shall be summoned according to the provisions of this Act.

(2) Sections 115, 116, and 208, shall extend and apply to all interpleader issues and other actions mentioned in sub-section 2, of section 148. 47 V. c. 10, s. 10 (1-3).

Parties to
give
notice to
Clerk
if they
require
a jury.

156. (z) In case the plaintiff requires a jury to be summoned to try the action, he shall give notice thereof in writing to the clerk at the time of entering his account, demand or claim, and shall at the same time pay to the clerk the proper fees for the expenses of such jury; and in case the defendant requires a jury, he shall, within five days after the day of service of the summons on him, give to the clerk or leave at his office the like notice in writing, and shall at the same time pay the proper fees as aforesaid; and thereupon, in either of such cases, a jury shall be summoned according to the provisions hereinafter contained. R. S. O. 1877, c. 47, s. 110.

Who may
be jurors

157. (a) All male persons being subjects of Her Majesty by birth or naturalization, between the ages of twenty-one and sixty years, assessed upon the collector's roll, and resident

(z) Sinclair's D. C. Act, 1879, 141, 142.

R. & J., 1963; Ont. Digest, 1884, 398; 4 Mews' Digest, 1165-1177.

(a) Sinclair's D. C. Act, 1879, 142.

This Section makes provision for juries in the Division Court. The general Act relating to juries will, therefore, not be applicable.

in the several divisions respectively, shall be jurors for the Division Courts in such divisions. R. S. O. 1877, c. 47, s. 111.

158. (b) (1) The jurors to be summoned to serve at a Division Court shall be taken from the collector's rolls of the preceding year for the townships and places wholly or partly within the division, and shall be summoned in rotation, beginning with the first of such persons on the roll; and if there be more than one township or place within the division, beginning with the roll for that within which the court is held, and then proceeding to that one of the other rolls which contains the greatest number of such persons' names, and so on until all the rolls have been gone through; after which, if necessary, they may be again gone through wholly or partly in the same order, and so on *toties quoties*. R. S. O. 1877, c. 47, s. 112.

Jurors.
how
selected
and sum-
moned.

(2) In case it shall not be necessary to summon all the persons on the roll or rolls entitled to be summoned in any one year, the clerk shall, at the end of each year, so certify on the roll, and shall state in the certificate the number of persons summoned during the year, and at what number on the roll he left off; and, in summoning persons for the next year, he shall begin with the next number on the roll as nearly as he conveniently can; and so on

(b) Sinclair's D. C. Act, 1879, 142, 143; Sinclair's D. C. Act, 1880, 70.

The improper selection or summoning of a jury can be taken advantage of by either party at the trial. In such case it would be the duty of the Judge, if he found any irregularity in that respect to exist, to postpone the trial of the cause so that a jury might be properly summoned if the parties would not consent to his trying it without a jury. The irregularity being that of an officer of the Court, neither party could be prejudiced by it.

from year to year until all the rolls have been gone through. 43 V. c. 8, s. 44.

Collector
to furnish
Clerk
with list
of jurors.

159. (c) For the purposes of the last preceding section, the collector for each place wholly or partly within any division, shall furnish the clerk of the Division Court thereof with correct lists of the names of all persons liable to serve as jurors at such court in the order in which they stand upon the rolls. R. S. O. 1877, c. 47, s. 113.

Summon-
ing jurors.

160. (d) For the trial of actions required to be tried by or before a jury at any session of a Division Court the clerk of the court shall cause not less than twelve of the persons liable to serve as jurors to be summoned to attend at such session at the time and place to be mentioned in the summons, and the summons shall be served at least three days before the court, either personally, or by leaving the same with a grown up person at the residence of the juror. 48 V. c. 14, s. 5.

Parties
entitled
to chal-
lenge.

161. (e) Either of the parties to a cause shall be entitled to his lawful challenge against any of the jurors in like manner as in other courts. R. S. O. 1877, c. 47, s. 115.

(c) Sinclair's D. C. Act, 1879, 143.

This Section makes provision for the manner in which the Collector of the Municipality shall furnish the Clerk of the Division Court with correct lists of the names of all persons liable to serve as jurors during the year.

It would be the duty of the Clerk to see that such list is duly furnished him, as required by this Section.

(d) Sinclair's D. C. Law, 1885, 131-135.

The notes to be found on those pages contain in substance the views of the writer upon this Section.

(e) Sinclair's D. C. Act, 1879, 144; see also Sinclair's D. C. Law, 1885, 131-135.

The Jury Act declares the right of peremptory challenge to any "four" of the jurors drawn to serve on the trial of the cause.

162. (f) Any juryman who, after being duly summoned for that purpose, wilfully neglects or refuses to attend the court, in obedience to the summons, shall be liable to a fine in the discretion of the Judge, not exceeding \$4, which fine shall be levied and collected with costs, by the same process as any debt or judgment recovered in the said court, and shall form part of the Consolidated Revenue Fund, R. S. O. 1877, c. 47, s. 116.

Penalty
on jurors
disobey-
ing sum-
mons

163. (g) Service as a juror at a Division Court shall not exempt such juror from serving as a juror in any Court of Record; and no person shall be compelled to serve as a juror in any Division Court who is by law exempted from serving as a petit juror in the High Court. R. S. O. 1877, c. 47, s. 117.

Service as
juror at
Division
Court not
to exempt
him from
serving in
Courts of
Record

164. (h) If a collector, for six days after demand made in writing, neglects or refuses to furnish the clerk of the Division Court in which the township, town, city or ward for which he is a collector is wholly or in part situate, with a correct list of the names of persons liable to serve as jurors in the Division Court, according to the provisions of section

Proceed-
ings
against
collector
neglect-
ing to
furnish
clerk
with list
of jurors

(f) Sinclair's D. C. Act, 1879, 144, 145.

The consequence which this Section prescribes on the non-attendance of a juryman after he has been duly summoned and wilfully neglects to attend the Court in obedience to the summons is all the law allows. No other contempt or punishment could be imposed: R. v. Lefroy, L. R., 8 Q. B., 134.

(g) Sinclair's D. C. Act, 1879, 145.

It will be observed that this Section does not exempt a juror summoned for service at the Division Court from serving as a juror in any Court of record, but no person who is exempt from service in the High Court can be compelled to serve in a Division Court.

(h) Sinclair's D. C. Act, 1879, 145.

It will be observed that this Section makes provisions for the default of the Collector in not furnishing the Clerk with a list of jurors as required.

157 of this Act. the clerk may issue a summons to be personally served on the collector three days at least before the sitting of the court, requiring him to appear at the then next sitting of the court. to shew cause why he refused or neglected to comply with the provisions of the said section. R. S. O. 1877, c. 47, s. 118.

Judge
may fine
collector
for
breach of
duty.

165. (i) Upon proof of the service of the summons, the Judge may, in a summary manner, inquire into the neglect or refusal, or may give further time, and may impose such fine upon the collector, not exceeding \$20, as he deems just, and may also make such order for the payment by the collector of the costs of the proceedings as to the said Judge seems meet; and all orders made by the Judge for the payment of a fine or costs shall be enforced against the collector by such means as are provided for enforcing judgments in the Division Courts. R. S. O. 1877, c. 47, s. 119.

Judge's
list and
Jury list

166. (j) The causes to be heard by the Judge alone shall be set down for hearing in a separate list from the list of causes to be tried by a jury, which two lists shall be severally called "The Judge's List," and "The Jury List," and the causes shall be set down

(i) Sinclair's D. C. Act, 1879, 145, 146.

This Section gives the power to fine the Collector for a neglect or refusal to furnish the jurors' list.

The Judge has also power to grant further time to him for doing so.

Any order made by a Judge for the payment of a fine or costs under this Section may be enforced by execution in the ordinary way.

(j) Sinclair's D. C. Act, 1879, 146.

The policy of the law in regard to Division Court causes is that the Judge himself shall dispose of the case, unless a jury has been duly summoned.

This Section makes provision for two lists, one the Judge's list and the other the Jury list.

in the lists in the order in which they were in the first instance entered with the clerk:—
 "The Jury List" shall be first disposed of, and then "The Judge's List;" except where the Judge sees sufficient cause for proceeding differently. R. S. O. 1877, c. 47, s. 120.

167. (k) Five jurors shall be empanelled and sworn to do justice between the parties whose cause they are required to try, according to the best of their skill and ability, and to give a true verdict according to the evidence, and the verdict of every jury shall be unanimous. In the event of the panel being exhausted before a jury shall be obtained, the Judge may direct the clerk to summon from the body of the court a sufficient number of disinterested persons to make up a full jury, and any person so summoned may, saving all lawful exceptions and rights of challenge, sit and act as a juror as fully as though he had been regularly summoned. R. S. O. 1877, c. 47, s. 121; 43 V. c. 8, s. 49.

Five jurors to be empanelled, etc.

Verdict to be unanimous.

Judge may call tales.

168. (l) In case the Judge before whom an action is brought thinks it proper to have any

Judge may order jury

The Jury list should be first disposed of, unless the Judge for sufficient cause proceeds differently. The convenience of jurors summoned was evidently considered in the framing of this Section: the object clearly was to free them from duty as soon as the business would permit of it.

(k) Sinclair's D. C. Act, 1879, 146; Sinclair's D. C. Act, 1880, 73.

This Section makes provision that five jurors only shall be empanelled and sworn in a Division Court case. The oath is that they shall do justice between the parties whose cause they are required to try, according to the best of their skill and ability, and to give a true verdict according to the evidence. The form of oath will be found at page 325 of Sinclair's D. C. Act of 1879.

Should the panel of a jury be exhausted before a jury should be obtained, the Judge has power to direct the Clerk to summon from the body of the Court a sufficient number to make up a full jury. The same rights to the parties would exist in regard to them as to the jury regularly summoned.

(l) Sinclair's D. C. Act, 1879, 146, 147; D. C. Law, 1884, 57-69.

Power is given to the Judge in this Section to have "any fact" controverted in the cause tried by a jury if he should think proper.

to be em-
panelled
to try any
disputed
fact.

fact controverted in the cause tried by a jury, the clerk shall instantly return a jury of five persons present, to try such fact, and the Judge may give judgment on the verdict of the jury, or may grant a new trial on the application of either party, in the same way and under similar circumstances as new trials are granted in other cases on verdicts of juries; this section shall extend and apply to the trial of an interpleader issue. R. S. O. 1877, c. 47, s. 122; 47 V. c. 10, s. 10 (2).

Judge
may dis-
charge
jury not
agreeing,
etc.

169. (m) If in any case the Judge is satisfied that a jury, after having been out a reasonable time, cannot agree upon their verdict, he may discharge them, and adjourn the cause until the next court, and order the clerk to summon a new jury for the next sitting of the court for that division, unless the parties consent that the Judge may render judgment on the evidence already taken, in which case he may give judgment accordingly. R. S. O. 1877, c. 47, s. 123.

The same rules regarding juries and their verdicts and the application for new trial thereof, as in other cases, would equally apply to this Section.

The words "any fact" would mean any fact or facts, which, in the opinion of the Judge, were of so controverted a nature as to be a fit subject for the consideration of a jury.

It will be observed that the original Section in this respect did not apply to Interpleader issues, but now the Judge has the same power to direct a jury to be called in that form of action as in any other.

(m) Sinclair's D. C. Act, 1879, 147.

Provision is here made that if a jury, after having been out a reasonable time, cannot agree upon their verdict, the Judge may discharge them and adjourn the case till the next sittings of the court. The Clerk may be ordered to summon a new jury for that sittings. The parties, however, may consent that the Judge may render judgment on the evidence already taken, in which case he may give judgment accordingly. The consent need not be in writing.

It is generally a matter of great difficulty for a Judge to determine what is "a reasonable time." Every case must depend upon its own circumstances and whether obstinacy, prejudice or other improper influence has found a place in the jury-room, as it frequently does, it is for the Judge, as best he can, to determine that question before discharging a jury. On the subject of discharging a jury, see 5 Mews' Digest, 1923.

170. (n) There shall be paid to the clerk ^{Fees for jury fund.} of the Division Court, in addition to all costs or jury fees, now by law payable, on every action entered where the claim exceeds \$20 but does not exceed \$60, three cents; where the claim exceeds \$60, but does not exceed \$100, six cents; and where the claim exceeds \$100, twenty-five cents; and the same shall be taxed and allowed as costs in the cause; and, ^{Return.} on or before the 15th day of January in every year, every clerk shall return to the treasurer of the county a statement, under oath, shewing the number of actions originally entered in his court during the year previous, in which the claim exceeded \$20 but did not exceed \$60, the number in which the claim exceeded \$60, but did not exceed \$100, and the number in which the claim exceeded \$100; and he shall, with the statement, pay over to the treasurer the sum of three cents on every action so entered where the claim exceeded \$20 but did not exceed \$60; the sum of six cents on every action where the claim exceeded \$60, but did not exceed \$100; and the sum of twenty-five cents on every action where the claim exceeded \$100, together with all other moneys received by him for jurors' fees during the year: and the treasurer shall keep an account of all moneys so received by him under the head of "Division Court Jury Fund." 43 V. c. 8, s. 45.

(n) Sinclair's D. C. Act, 1880, 70, 71.

The Legislature appears to have considered that a small tax should be imposed on all parties to suits entered in the Division Court with a view of providing a jury fund, and such tax or fee should be allowed as costs in the cause. It is the duty of the Clerk, before the 15th of January in every year, to make the return to the County Treasurer, under oath, of the requirements of this Section. It is important that these returns should be duly made, otherwise the Clerk will be liable to indictment for neglect of duty, and to summary treatment by Government.

Return
in cities
forming
separate
divisions.

171. (o) In cities which include one or more entire divisions and no other fraction of a division the clerk shall make the return and payment, provided for by the next preceding section, to the treasurer of such city, who shall keep an account of such moneys in the same way as is provided in the case of county treasurers, and shall, on the presentation of the certificate of the Judge, forthwith repay to the clerk of the court the jurors' fees paid by him in the same manner as is hereafter provided in the case of county treasurers. 43 V. c. 8, s. 46.

Fees of
jurors.

172. (p) The clerk of every Division Court shall pay to every person who has been summoned as a juror, and who attends during the sittings of the court for which he has been summoned, and who does not attend as a witness in any cause, or as a litigant in his own behalf, the sum of \$1; and having so paid the same, except in the cases in the next preceding section provided for, the presiding Judge shall so certify to the treasurer of the county, and shall deliver the certificate to the clerk, and the treasurer of the county shall, upon the presentation of the certificate to him, forth-

(o) Sinclair's D. C. Act, 1880, 71.

In the case provided for by this Section the same returns are exacted of the Clerk as is required under the next previous Section.

Too much stress cannot be laid on the necessity of this, as of all other returns, being duly made.

It is the duty of the County or City Treasurer to repay the Clerk the moneys which he has disbursed to jurors as their fees forthwith after presentation of the Judge's certificate.

(p) Sinclair's D. C. Act, 1880, 71, 72.

The writer has nothing to add to the notes at the pages of the work just referred to. A Form of List of Jurors and the Certificate of the Judge for the payment of their fees under this Section appear at page 109 of Sinclair's D. C. Act, 1880, and in the Forms hereinafter given.

with pay to the clerk, or his order, the amount which the clerk appears, by the certificate, to have paid the jurors as aforesaid: in the case of cities, other than those provided for by the next preceding section, and towns separated from the county, the amounts paid in by the clerks of the courts in such cities and towns, and the amounts paid by the county treasurer to the clerks of such courts for jury fees, shall be taken into account in settling the proportion of the charges to be paid by the city or town towards the costs of administration of justice. 43 V. c. 8, s. 47.

PROCEEDINGS TO GARNISH DEBTS.

173. (g) Subject to the provisions of the next section, when a debt or money demand of the proper competence of the Division Court, and not being a claim strictly for damages, is due and owing to one party from another party, either on a judgment of a

Garnish-
ment of
debts.

(g) Sinclair's D. C. Act, 1879, 147-152; D. C. Act, 1880, 119, and pages there referred to; D. C. Law, 1884, 261-266, and the pages there referred to; D. C. Law, 1885, 293, 294, and the pages of that work there referred to; D. C. Act, 1886, 141, and the pages there referred to.

The subject of garnishment involves a very long discussion of the question in the works just referred to. The writer has hitherto attempted to get all the English cases and most of the prominent of American cases on that subject, and now desires to mention again some of the older cases as well as the recent ones in that branch of the law.

Since these works have been written several decisions of importance have been rendered, not only in our own Courts but in the English Courts, on the subject of garnishment. To these and others the writer will refer in the notes to this Section.

A doubt sometimes arises when the proceeding of garnishment takes effect. We submit that the garnishee order has efficacy only from the time of its being obtained and served: *In re General Horticultural Company (Limited)*. *Ex parte Whitehouse*, 32 Ch. D., 512; *Drake on Attachment*, 5th Ed., 451.

An equitable charge given before a garnishee order is obtained takes priority to the order, even in the absence of notice of the charge: *Badeley v. Consolidated Bank*, 34 Ch. D., 536; *W. N.*, 1888, p. 80.

An execution creditor is not in the position of a purchaser or mortgagee who

Division Court or otherwise, and a debt is due or owing to the debtor from any other party, the party to whom such first mentioned debt or money demand is so due and owing (hereinafter designated the primary creditor), may attach and recover, in the manner herein provided, any debt due or owing his debtor (hereinafter designated the primary debtor), from any other party (hereinafter designated the garnishee), or sufficient thereof to satisfy the claim of the primary creditor, subject always to the rights of other parties to the debts owing from such garnishee. R. S. O. 1877, c. 47, s. 124.

has advanced money on the faith of the priority. He can only take the beneficial interest of the creditor: *Drake on Attachment*, 453a; 32 Ch. D., 512.

The assignee of a judgment debt could take proceedings under this Section: See Section 178; *Goodman v. Robinson*, 18 Q. B. D., 332.

Where money has been improperly paid over, the Court would have power to order restitution to the proper party: *McKindsey v. Armstrong*, 11 P. R., 200.

Costs coming to the plaintiff constituted an attachable debt before taxation, and is bound by the service of a garnishment process from a Division Court after the amount was ascertained by taxation: *Macpherson v. Tisdale*, 11 P. R., 261.

It was held in the case of *Apthorpe v. Apthorpe*, 12 P. D., 192, that the pay of a surgeon in Her Majesty's Navy, who was in active service, could not be garnished.

There must be an actual receipt of the debt by the attaching creditor, unless the money is paid into Court: *Butler v. Wearing*, 17 Q. B. D., 182.

A judgment more than six years' old could be enforced by garnishment: *Fellows v. Thornton*, 14 Q. B. D., 335.

In England, a Solicitor's lien prevails over garnishment: *Dallow v. Garrold*, 14 Q. B. D., 543.

The debt, legal or equitable, owing by a garnishee to a judgment debtor which can be attached to answer the judgment debt must be a debt due to such judgment debtor alone, and where it is only due to him jointly with another person it cannot be so attached: *Macdonald v. The Tacquah Gold Mines Co.*, 13 Q. B. D., 535.

Garnishment binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishment order or summons was obtained and served. Consequently it was postponed to a prior equitable assignment of the debt, even in the absence of notice: *In re General Horticultural Co. Ex parte Whitehouse*, 32 Ch. D., 512.

As to what is an equitable assignment of a debt so as to defeat garnishment, see *Percival v. Dunn*, 29 Ch. D., 128.

A debt which has been assigned cannot be garnished: *Sinclair's D. C. Law*, 1884, 126, and cases there cited.

The Court has power to issue a stop order at the instance of a Judgment Creditor of a party entitled to funds in Court: *Wilson v. McCarthy*, 7 P. R., 182.

A person must be made a party to garnishment proceedings before his rights can be affected thereby: *Re Fair v. Bell*, 2 App. R., 632. See *Turnbull v. Robertson*, 38 L. T. N. S., 389.

Formerly there was no appeal in garnishment proceedings: *Sato v. Hubbard*, 6 App. R., 546. But now in certain cases there is by Statute. See Section 148.

An equitable debt is now the subject of garnishment: *In re Cowan's Estate*. *Rapier v. Wright*, 14 Ch. D., 638; *Leaming v. Woon*, 7 App. R., 42; *Wilson v. Dundas*, W. N., 1875, 232.

A negotiable promissory note not yet due is not a debt which may be attached: *Sinclair's D. C. Law*, 1884, 132, 138.

It is submitted that a promissory note in the hands of the garnishee at the time of the garnishment would possibly be garnishable.

The County Treasurer cannot be garnished on a judgment against the Clerk of the Peace for that County for moneys which may come into the hands of such County Treasurer for said Clerk of the Peace after the Board of Audit has passed upon his accounts, the same not being a garnishable debt: *In re Hanvey v. Stanton*, 13 L. J. N. S., 106.

It is doubtful in the case of a transcript from a Division to a County Court if it is necessary to set out garnishee proceedings taken after judgment: *Ghent v. Tremain*, 17 L. J. N. S., 172; *Farr v. Robins*, 12 C. P., 35; *Jacomb v. Henry*, 13 C. P., 377; *Hope v. Graves*, 14 C. P., 393; *Burgess v. Tully*, 24 C. P., 549.

Rent which is accrued by virtue of the Apportionment Act of Ontario may be attached and may be ordered to be paid, when due, to satisfy the primary debt: *Sinclair's D. C. Law*, 1884, 131, and cases there cited.

The better opinion seems to be that trustees are not garnishable while acting under the will of the father of the Judgment Debtor, who received moneys by way of interest as the same accrued due: *Lloyd v. Wallace*, 9 P. R., 335; *Webb v. Stanton*, 11 Q. B. D., 518. But see *Stewart v. Gough*, 23 L. J. N. S., 414.

As to when a garnishee ceases to be a debtor, see *Wardrope v. Canadian Pacific Ry. Co.*, 20 L. J. N. S., 133.

Money paid in to a Division Court Clerk to the credit of a suitor in a case is garnishable: *Sinclair's D. C. Law*, 1884, 135, and cases there cited. See *Dillon v. Garrold*, 14 Q. B. D., 543.

The allowance to a juror is not garnishable in the hands of the County Treasurer: *Phillips v. Austin*, 3 Car. L. T., 316.

A defendant who has obtained execution upon a rule of Court for the payment of costs of the day by the plaintiff is a judgment creditor entitled to garnish moneys due to the plaintiff: *Sinclair's D. C. Law*, 1884, 135, 136.

The question of the validity of a judgment should not be argued on the return of a garnishee summons, but should be raised on an application specially made to set aside the execution: *Sinclair's D. C. Law*, 1884, 135, and cases there cited.

Money to come into the hands of trustees is not garnishable, but would be garnishable when such money was actually in the hands of the trustees: *Webb v. Stanton*, 11 Q. B. D., 518. But see *Stewart v. Gough*, 23 L. J. N. S., 414.

Surplus money of a bankrupt's estate in the hands of the official Assignee is not garnishable: *Re Greensill*, L. R., 8 C. P., 24.

A garnishee order is not the proper proceeding to reach money lodged in the name of the Master of the Court to the credit of the cause, but a charging order would seem to be: *Sinclair's* D. C. Law, 1884, 137.

The Court refuses to attach at the instance of a judgment creditor on a judgment *de bonis testatoris* against an executrix's funds which were lodged by her in that capacity in the bank of the judgment creditor: *Hewat v. Davenport*, 21 W. R., 78.

See also as to Government stock, *Idem*.

The writer is of the opinion that a debt cannot be garnished unless the garnishee lives within the Province: *Martin v. Keily*, 5 Irish C. L., 404; *Dulmage v. The Judge of Leeds and Grenville*, 12 U. C. R., 32, and other parts of this work.

When the parties to a garnishment proceeding consent to a Judge in Chambers deciding the matter in a summary way, it is final and conclusive: *Eade v. Windsor*, 47 L. J. Q. B., 584.

As to the effect of an attaching order upon a Solicitor's costs, see *Sinclair's* D. C. Law, 1884, 139, 140.

A judgment creditor who had obtained a garnishment order to attach debts due to his debtor was held not to obtain any charge on his debts until the service of the order on the garnishees: *In re Stanhope Silkstone Collieries Co.*, 11 Ch. D., 942. See *Hamers v. Giles*, 11 Ch. D., 942.

It is broadly laid down in *Turnbull v. Robertson*, 38 L. T. N. S., 389, that where a garnishee has been compelled by process of law to pay a debt to the Sheriff, he cannot be called upon to pay it a second time to the plaintiff: See *Sinclair's* D. C. Law, 1884, 173, 174, and cases cited.

A garnishee order cannot be made under the Judicature Act attaching a debt due from a partnership firm described by its partnership name. This is so held from the peculiar language used in the Judicature Act. The same rule would apply to Division Courts: See *Walker v. Rooke*, 6 Q. B. D., 631.

The salary of a Secretary of a Company amounting to £200 a year is not wages of a servant, and in England was held not garnishable: *Gordon v. Jennings*, 9 Q. B. D., 45. See *Lea v. Parker*, 13 Q. B. D., 835.

As to what are "visible means," see *Lea v. Parker*, 13 Q. B. D., 835.

Money payable to a wife by Trustees to her separate estate was held not to be the subject of garnishment: *Sinclair's* D. C. Law, 1884, 142-143, and cases there cited.

A judgment creditor who has obtained a garnishee order against the mortgagor debtor of his debtor is not entitled to the surplus proceeds of the mortgage estate when sold by a prior mortgagee under his power of sale, the sale having taken place after the date of the garnishee order. But the holder of a garnishee order against the first mortgagee, such order having been obtained after the sale, is entitled to attach the surplus proceeds of sale in the hands of the first mortgagee: *Sinclair's* D. C. Law, 1884, 143-144.

The writer submits that the garnishor would only have this right where there is no subsequent encumbrancer.

In order to attach a debt to become due, the payment of it must be absolute and not merely conditional: See *Sinclair's* D. C. Law, 1884, 144, 145.

As to the right to garnish on an order for costs, see *Sinclair's* D. C. Law, 1884, 146.

A superannuation allowance past due may be garnished, but no future payments of such allowance: *Sinclair's D. C. Law*, 1884, 146.

A garnishee can set off against a judgment creditor costs incurred by him, but not paid at the time the issue was directed, against which the judgment debtor is bound to indemnify the garnishee: *Rymill v. Wandsworth District Board*, 1 C. & E., 92.

In garnishee proceedings where the money garnished is trust money, or there is reasonable suspicion it is trust money, the *cestui qui trust* has a right to come forward and contest the attaching creditor's right: *Roberts v. Death*, 8 Q. B. D., 319.

Garnishment in the United States draws no support from the Common Law. It is entirely a statutory proceeding: *Sinclair's D. C. Law*, 1884, 148.

It rests wholly on judicial process, and depends upon the due pursuit of the steps prescribed by law for its prosecution, and if a different proceeding is pursued, to the prejudice of another creditor, such proceeding is void: *Sinclair's D. C. Law*, 1884, 149.

Garnishment is, in effect, a suit by the defendant in the plaintiff's name against the garnishee with reference to the defendant's concurrence, and, indeed, in opposition sometimes to his will: *Daniels v. Clark*, 38 Iowa, 556.

By garnishment the creditor obtains an effectual attachment of the money of the defendant in the garnishee's hands, and its effect is to restrain the garnishee from paying his debt to the defendant: *Sinclair's D. C. Law*, 1884, 149. See Section 179 hereto.

Garnishment creates no lien on the real or personal property of the garnishee: *Sinclair's D. C. Law*, 1884, 149.

The proceedings by garnishment can have no effect to overthrow trusts in order to reach moneys supposed to belong to a debtor. Such moneys must be the property of the debtor absolutely: *White v. White*, 30 Vermont, 338; *Keyser v. Mitchell*, 67 Penn., 473; 34 Ch. D., 536. W. N., 1888, p. 30.

Garnishment proceedings take precedence in the order of their service: See *Sinclair's D. C. Law*, 1884, 150.

The plaintiff does not acquire any greater rights against the garnishee than the defendant himself possesses: *Sinclair's D. C. Law*, 1884, 150.

There can be no judgment against the garnishee until final judgment is recovered against the defendant, or as we term it in our Division Courts, the "primary debtor." *Washburn v. N. Y. & V. M. Co.*, 41 Vermont, 50; *Emanuel v. Smith*, 38 Georgia, 602; and if judgment against the primary debtor be reversed, that against the garnishee should likewise be reversed: *Rowlett v. Lane*, 43 Texas, 274.

In most States of the Union third parties claiming the debt are allowed to intervene and establish their right: *Peck v. Stratton*, 118 Mass., 406.

The garnishee's liability must be affirmatively shown, which always devolves upon the plaintiff to make out his case against the garnishee: *Webster v. Gage*, 2 Mass., 503; *Porter v. Stevens*, 9 Cushing, 580.

Two things in most States of the Union must concur to render garnishment effectual: (1) Possession of property capable of being seized or money in the hands of a garnishee; (2) A liability *ex contractu* to the defendant, whereby the latter has, at the time of garnishment, a cause of action present or future against the garnishee: *Sinclair's D. C. Law*, 1884, 151.

The garnishee must be a third person: *Sinclair's D. C. Law*, 1884, 151-152.

The writer submits that a firm, of which the primary creditor was a partner, would be such third person: See *Stewart v. Gough*, 23 L. J. N. S., 414.

In some of the American States a debt in the course of collection, or money in the hands of a person as trustee, to be paid over merely, is not the subject of garnishment: Sinclair's D. C. Law, 1884, 152.

The writer submits that our cases do not establish this wide proposition: Sinclair's D. C. Law, 1884, 152, 153.

Officers of the law, whose duty it is to hold moneys for suitors, have in the United States been generally held exempt from garnishment process: Sinclair's D. C. Law, 1884, 153, 154.

Neither our Dominion nor Provincial Governments can be made garnishees, unless so declared by proper Statutory authority: Sinclair's D. C. Law, 1884, 154-155; *Apthorpe v. Apthorpe*, 12 P. D., 192.

In the United States, too, an assignment of debt defeats the right of garnishment, but the position of the assignee can be impeached on the ground of fraud or other legal ground: Sinclair's D. C. Law, 1884, 155. So it can in the Division Court, under Section 197 of this Act.

Money, upon which the garnishee has a lien, cannot be taken from him without such lien first being discharged: Sinclair's D. C. Law, 1884, 155.

A liability cannot be enforced against the garnishee for a debt based on an illegal consideration: *McGlinchy v. Winchell*, 63 Maine, 31.

The rule in the United States may be considered as authoritative that no judgment can be rendered against a garnishee when there is not a clear admission or proof of a debt due or to become due to the defendant: Sinclair's D. C. Law, 1884, 155, 156.

It must be a debt payable in money or it cannot be garnished: Sinclair's D. C. Law, 1884, 156.

It is submitted that a debt arising under the 71st Section of this Act would not be the subject of garnishment. There could be no garnishment of a contingent liability merely: Sinclair's D. C. Law, 1884, 156.

Where several persons are jointly and severally liable for a debt, any one of them may be garnished in the same manner that he might be sued for the debt, with his co-debtor being joined in the action: Sinclair's D. C. Law, 1884, 156, 157.

Where a garnishee is not indebted in his individual capacity, but is a partner in a firm, it was held that he could not be charged without his partners being made parties to the proceeding: Sinclair's D. C. Law, 1884, 157.

The American law is the same as ours—that a firm cannot be garnished by its partnership name. The names of the individual members of the partnership must be set out in the process: Sinclair's D. C. Law, 1884, 157; *Walker v. Rooke*, 6 Q. B. D., 631.

Where there are several primary debtors, the money of each is liable for the whole debt. In such case it appears that if the garnishee is indebted to one or more of the defendants, though not to all, he will be chargeable: Sinclair's D. C. Law, 1884, 157.

As to the garnishment of the several debt of one or two primary debtors, see Sinclair's D. C. Law, 1884, 158.

Unnegotiable promissory notes, being in the same position as ordinary choses in action, are the subject of garnishment in the same manner as any other debt: Sinclair's D. C. Law, 1884, 158, 159.

As to the garnishment of negotiable promissory notes, the course of many States differ on that subject: Sinclair's D. C. Law, 1884, 159, 160. See *Drake on Attachment*, 5th Ed., 582-588, 703a.

The liability of the garnishee cannot be changed or enlarged beyond the

extent of his contract or his liability to the debtor: *Sinclair's D. C. Law*, 1884, 160-161.

It does not vary the liability of the garnishee that his contract with the primary debtor is to pay in another country than that in which the contract is made: *Blake v. Williams*, 6 Pick., 175.

Where it is agreed between the garnishee and the primary debtor that in order to defeat the garnishment, notes should be given by the garnishee to a third person, which is done without the concurrence or knowledge of such third person, it is a fraud on the attaching creditor: *Camp v. Clark*, 15 Vermont, 387. See also *Sinclair's D. C. Law*, 1884, 161.

The same doctrine was enunciated in *Enos v. Tuttle*, 3 Conn., 27; *Pattson v. Gates*, 67 Illinois, 164; *Langley v. Berry*, 14 New Hamp., 82; *D'Andorff v. Oliver*, 8 Kansas, 365.

The assignment of a debt after garnishment has no effect as against the attaching creditor: *Stevens v. Pugh*, 12 Iowa, 430.

The garnishee will not, where he does not assume the character of a litigant, be chargeable with the cost of garnishment proceedings against him or those against the defendant without it appears that he has sufficient funds in his hands for that purpose: *Sinclair's D. C. Law*, 1884, 163.

There can only be judgment against the garnishee for a sufficient amount to cover the claim of the attaching creditor and costs: *Tyler v. Winslow*, 46 Maine, 348.

Whatever defence the garnishee could urge against an action by the primary debtor, he may set up in bar against him as a garnishee: *Strong's Executor v. Bass*, 35 Penn., 333; *Edson v. Sprout*, 33 Vermont, 77.

As to the effect of a voluntary payment by a garnishee of his debt to the primary debtor after the garnishment, and with a knowledge of its existence, see *Sinclair's D. C. Law*, 1884, 164, and Section 190.

Where payment was alleged to be made by cheque of the garnishee, which had not been presented or paid, was held not a valid payment by him: *Dennie v. Hart*, 2 Pick., 204; See *Barnard v. Graves*, 16 Pick., 41.

Where a payment is made by one of two garnishees, jointly liable, who paid the debt in ignorance of the garnishment proceedings, it was held that both were discharged by such payment: *Jewett v. Bacon*, 6 Mass., 60; *Nash v. Brophy*, 13 Metcalf, 476.

Payment under a previous garnishment operates as a discharge in any subsequent garnishment proceeding: *New Orleans M. & C. R. Co. v. Long*, 50 Alabama, 498.

An unauthorized payment by the garnishee to the primary creditor will be ineffectual: *Sinclair's D. C. Law*, 1884, 166, Section 190.

A garnishee may take advantage of the Statute of Limitations just as he could if sued by the primary debtor: *Sinclair's D. C. Law*, 1884, 166.

Or he may set up want of consideration as he could have done if an action was brought by the primary debtor: *Sinclair's D. C. Law*, 1884, 166, 167.

If a debtor, even by default of his creditor, is discharged from his contract he may not in respect of that contract be charged as a garnishee of the primary debtor: *Jewett v. Bacon*, 6 Mass., 60.

Any defence which the garnishee may choose to set up must, in order to be successful, be such as would avail him in an action by the primary debtor against him. Extraneous matters having no relation to the question of indebtedness cannot be set up by the garnishee: *Sinclair's D. C. Law*, 1884, 167, 168.

A garnishee cannot retain from the money in his hands anything to meet

contingent liability which he is under for the debtor: *Smith v. B. C. & M. R. R.*, 33 New Hamp., 337.

As to the right to retain money for Solicitor's fees due and contingent, see *Sinclair's D. C. Law*, 1884, 169.

A garnishee cannot escape liability by showing that the defendant's money in his hands had been received by him through a transaction in violation of law: *Thayer v. Partridge*, 47 Vermont, 423; See *Bridger v. Savage*, 15 Q. B. D., 363.

A garnishee may avail himself of the law of set-off: *Sinclair's D. C. Law*, 1884, 169, 170, but an after acquired set-off would not: *Boston Type Co. v. Mortimer*, 7 Pick., 166.

A garnishee can only set-off against his indebtedness to the defendant a claim in the same right as such indebtedness, therefore, where a garnishee is indebted to the defendant, he cannot set-off a claim he has as administrator of another person against the defendant: *Thomas v. Hopper*, 5 Alabama, 442. A doubt will arise in regard to Counter-claim, upon which no opinion is expressed.

So if he is indebted individually to the defendant he cannot set-off a debt due from the defendant to him and another jointly: *Gray v. Badgett*, 5 Arkansas, 16; also *Wells v. Mace*, 17 Vermont, 503; *Blanchard v. Cole*, 8 Louisiana, 160. See also *Brown v. Warren*, 43 New Hamp., 430.

Where a town was garnished and attempted to set-off a tax due to it from the defendant against its indebtedness, the right was denied upon the ground that the debt was not in any sense a contract expressed or implied: *Sinclair's D. C. Law*, 1884, 171.

The garnishee cannot be deprived of the right of recoupment or of any like defence: *Sinclair's D. C. Law*, 1884, 170, 171.

The garnishee cannot avoid or reverse a judgment against him on account of mere irregularities in the proceedings in the main action, such as only affect the defendant himself, who alone can take advantage of them: *Stebbins v. Fitch*, 1 Stewart (Ala.), 180.

There is some doubt of the proper course to pursue by a garnishee when sued by the primary debtor for the money during the pendency of the garnishee proceeding: *Sinclair's D. C. Law*, 1884, 172.

It is submitted that the proper course to pursue would be to apply to stay the action of the primary debtor until the disposal of the garnishment proceeding.

Judgment in the garnishment action is conclusive against all parties and privies thereto of all matters of right and title decided by the Court: *Sinclair's D. C. Law*, 1884, 172, 173.

If judgment was obtained against a man that was dead, payment under it by the garnishee would be void and no protection: *Loring v. Folger*, 7 Gray, 505.

A payment must not be voluntary unless the law authorized the Court to require the garnishee to pay the money into Court. Such payment will be regarded as in legal effect the same as if paid under execution: *Sinclair's D. C. Law*, 1884, 173, 174.

The payment must be actual and not simulated or contrived: *Sinclair's D. C. Law*, 1884, 174.

The Court must have jurisdiction to render the payment valid: *Sinclair's D. C. Law*, 1884, 174.

The Statute implies a condition necessary to be performed before payment which must be shewn to have been made in order to render the payment

effectual: *Meyers v. Ulrich*, 1 Binney, 25; *Sykes v. B. & O. Ry. Co.*, 22 U. C. R., 459.

A garnishee is not to be held responsible for the regularity of the proceedings under which he is garnished: *Parmer v. Ballard*, 3 Stewart, 326; *Burton v. District Township*, 11 Iowa, 166.

If at any time prior to judgment against the garnishee he becomes aware of the assignment of the debt and does not bring that fact before the Court but allows judgment to go against him, he cannot set-off the garnishment proceedings in an action against him by the assignee of the debt: *Prescott v. Hull*, 17 Johnson, 284; *Seward v. Heflin*, 20 Vermont, 144; *Marshall v. Davis*, 24 Vermont, 363.

If a person maliciously, and without reasonable and probable cause, takes a garnishment proceeding, in consequence of which a debtor suffers damage, an action will lie therefor: *Sinclair's D. C. Law*, 1884, 175.

Garnishment is not applicable to compel a garnishee to pay an amount which he had agreed to lend the defendant: *Nellis v. Coleman*, 12 Rep. (Penn.), 797.

A garnishee is not estopped from denying his indebtedness to the principal defendant by having previous to suit admitted the debt to the plaintiffs, knowing that they would act on his admission, if it does not appear that the plaintiffs have been injured thereby: See *Blackburn on Sale*, 2nd Ed., 190; *Warder v. Baker*, 54 Wis., 49.

If a judgment is void as against the defendant it is not enforceable against a garnishee: *Matheney v. Earl*, 75 Indiana, 531.

It was held in *Blake v. Hubbard*, 45 Michigan, 1, that allowing garnishment proceedings to stand open for two years while a plaintiff was prosecuting a bill in Chancery in aid of execution was an abandonment of the garnishment.

Money put into the hands of another to be paid to certain persons named on presentation of the depositors' cheques or orders was held liable to the garnishment by the depositors' creditors, there being no evidence of previous agreement or subsequent assent on the part of the persons so named concerning the deposit: *Nicholson v. Crook*, 56 Maryland, 55.

A garnishee must allow a reasonable time after the dismissal of garnishment proceedings against him to allow an appeal, but more especially should he do so where he has notice of the appeal. In such case he is not justified in paying over the money immediately: *Sinclair's D. C. Law*, 1884, 177.

The indebtedness arising from a recovery for libel or other unliquidated damages cannot be garnished until after the entry of judgment: See *Sinclair's D. C. Law*, 1884, 177.

Garnishment proceedings reach only to those debts which, whether due or not, are owing by the garnishee to the debtor at the time of the serving of the garnishment process, and where after the service of such process new and independent contracts are entered into between the garnishee and the debtor, out of which arise liabilities from the former to the latter, such liabilities, although fixed before the answer day, are not within the scope of or affected by the prior garnishment process: *Phelps v. Atchison, T. & St. F. R. Co.*, 27 Alb. L. J., 116.

An attaching creditor may be one of the garnishees: *Stewart v. Gough*, 23 L. J. N. S., 414, and the debtor's share under will was held attachable: *Leaming v. Woon*, 7 App. R., 42, followed, in preference to *Webb v. Stenton*, 11 Q. B. D., 518. *Idem*.

To render wages garnishable they must be due at the time of issue and

Debts due
for wages
not to be
attached,
except as
to excess
over \$25.

174. (r) No debt due or accruing to a mechanic, workman, labourer, servant, clerk, or employee for, or in respect of, his wages or salary, shall be liable to seizure or attachment under this Act, or any other Act relating to the attachment or garnishment of debts, unless the debt exceeds the sum of \$25, and then only to the extent of the excess. R. S. O. 1877, c. 47, s. 125; c. 50, s. 318.

Saving
clause as
to certain
debts.

175. (s) Nothing in the next preceding section contained shall apply to any case where the debt has been contracted for board or lodging, and in the opinion of the Judge, the exemption of \$25 is not necessary for the support and maintenance of the debtor's family. R. S. O. 1877, c. 47, s. 126; 47 V. c. 9 s. 1; c. 50, s. 319.

service of the garnishment proceeding: *Foster v. Singer*, 23 L. J. N. S., 426; *Wis. Sup. Ct.* As to wages during servant's illness, see 23 L. J. N. S., 426.

As to the attachment of debts generally, see the cases in our own Courts of *Wardrop v. Can. P. Ry. Co.*, 7 Ont. R., 321; *Stuart v. McKim*, 8 Ont. R., 739; *McCraney v. McLeod*, 10 P. R., 539; *McKindsey v. Armstrong*, 10 App. R., 17; *Purves v. Slater*, 11 P. R., 507; *Roblee v. Rankin*, 11 Sup. R., 187; Ont. Digest, 1887, 25.

(r) *Sinclair's D. C. Act, 1879, 152.*

The reader is referred to the several pages of the work cited in the next preceding Section.

It has been contended that, under this Section, where a mechanic works by the piece and not by the day that this clause does not apply to such a case. It has been held by the Judge of the County of Wentworth that the Section has application as much to one as the other; that work performed either one way or the other should be considered "wages" within the meaning of this Section.

We think that where a garnishee makes a defence under Section 188 of this Act, he should, if the debt is for wages or salary, shew whether the amount, if not admitted by him, is or is not subject to the exemption mentioned in this Section.

See also *Apthorpe v. Apthorpe*, 12 P. D., 192.

It was held in the case of *In re Macfie v. Hutchinson*, 23 L. J. N. S., 159, that the Medical Health Officer of the City of London (Ont.) was an employee within the meaning of this Section, and that his salary to the extent of \$25 was exempt.

(s) *Sinclair's D. C. Act, 1879, 152; Sinclair's D. C. Law, 1884, 1-16.*

Two things are necessary before the exemption here mentioned shall be

176. (t) In all cases where a defendant, primary debtor or garnishee intends to contest the jurisdiction of a Division Court to hear or determine any cause, matter or thing in such court, he shall leave with the clerk of the court, within eight days after the day of service of the summons on him (where the service is required to be ten days before the return), or within twelve days after the day of such service (where the service is required to be fifteen or twenty days before the return), a notice to the effect that he disputes the jurisdiction of the court, and the clerk shall forthwith give notice thereof to the plaintiff, primary creditor, or their solicitor or agents in the same way as notice of defence is now given, and in default of such notice disputing the jurisdiction of the court, the same shall be considered as established and determined, and all proceedings may thereafter be taken as fully and effectually as if the said action or proceeding had been properly commenced, entered or taken in such court; and the notice shall be in writing; and prohibition to a Division Court shall not lie in such action from any Court whatever, where the notice disputing the jurisdiction has not been duly given as aforesaid. 43 V. c. 8, s. 14; 48 V. c. 14, s. 1.

Attach-
ment of
debts due
for wages,
etc.

Notice
where
jurisdic-
tion of
Court
disputed
to be
given in
garnishee
cases.

subject to garnishment: (1) The debt must be for board or lodging; (2) That the Judge is of opinion that \$25 is necessary for the support and maintenance of the debtor's family. If both these contingencies exist the exemption would exist.

As to the meaning of the words "support and maintenance" and "debtor's family," it is submitted that a broad and liberal interpretation should be given to them: See Sinclair's D. C. Law, 1884, 13-16.

(t) Sinclair's D. C. Act, 1880, 31-33; Sinclair's D. C. Law, 1884, 1-16; Sinclair's D. C. Law, 1885, 1-37, 227, 228.

The reader is also referred to the different parts of this work and the other Division Court works of the writer, under the title of "Jurisdiction" and

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127. (u) In all cases under the provisions of sections 181 and 185 of this Act where the debt sought to be garnished is for wages or salary, there shall be upon, or annexed to the summons served on the garnishee, a memorandum shewing the residence of the primary debtor and the nature of his occupation in the service of the garnishee at the time of the issuing of the summons (if then in such service), and also stating whether the debt alleged or adjudged to be due by the primary debtor to the primary creditor was or was not incurred for board or lodging, and in the absence of such last mentioned statement the said debt may be presumed by the garnishee not to have been incurred for board or lodging. 49 V. c. 15, s. 11.

"Prohibition," where all the cases which the writer has been able to find are cited.

It must be observed that a party to a garnishment proceeding must give notice disputing the jurisdiction of the Court if he desires to take that ground as well as a defendant in an ordinary action. It has been remarked elsewhere in these pages that if this notice is not given within the prescribed time the Judge has no power to extend the time for giving it.

(u) Sinclair's D. C. Act, 1886, 29-32.

The Section of the present Act now under discussion does not affect the rights of parties as they previously existed, but deals with procedure in garnishment proceedings only.

The following appear to be prerequisites of summonses issued under either the 181st or 185th Sections of this Act, where the debt sought to be garnished is wages or salary:

(1) That there shall be upon or annexed to the summons served on the garnishee, but not necessarily on the one served on the primary debtor, a memorandum shewing the residence of the primary debtor and the nature of his occupation in the service of the garnishee at the time of the issuing of such summons, if there is such service.

(2) Also, stating therein whether the debt alleged or adjudged to be due by the primary debtor to the primary creditor was or was not incurred for board or lodging.

In the absence of such last mentioned statement, the debt sought to be garnished may be presumed by the garnishee not to have been incurred for board or lodging.

This Section evidently has for its object mainly the relief of railway and other corporations and large employers of labour. Hitherto they have been obliged to ascertain through the evidence at the trial whether, on their being garnished, they should pay the amount due by them less the exemption or

Where the Creditor's Claim is a Judgment.

178. (v) After judgment has been recovered in a Division Court, application may be made to a Judge of the court, by or on behalf of the primary creditor, on affidavit that such judgment was recovered, and when, and that the whole, or some part, and how much, thereof remains unsatisfied, and that the deponent has reason to believe, and does believe, that some

Attaching
order to
be granted
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independently of it. Now the onus is cast on the creditor of not only shewing whether his debt is for board or lodging, but also the residence of the primary debtor and the nature of his occupation if in the service of the garnishee, so that the garnishee may know what to do and not incur the trouble and expense of ascertaining it at the sittings of the Court. If the primary creditor does not shew *affirmatively* that his claim was incurred for board or lodging, then the garnishee is to presume that it was *not* so incurred, in which case he will only be called on to pay into Court the amount due less the \$25 exemption. The following may be used as a form of memorandum under this Section, to be endorsed upon or annexed to the summons served on the garnishee:

"Memorandum under 'The Division Courts Act,' Section 177.

"(1) The primary debtor resides at the City of Hamilton, in the Province of Ontario, and his occupation in the service of the garnishees is that of an engine-driver [*or as the case may be*] on the railway of the garnishees (The Grand Trunk Railway Company of Canada), and is occupied as such on said railway between the Cities of Toronto and Hamilton [*or as the case may be*].

"(2) The debt alleged [*or, if after judgment, 'adjudged'*] to be due by the primary debtor to the primary creditor was [*or 'was not'*] incurred for board or lodging."

If the primary debtor is not in the service of the garnishee, of course nothing need be said of his occupation, for the object evidently is to save any mistakes where there may be several men of the same name in the employ of the garnishee, and to facilitate the identification of the primary debtor.

The above memorandum must in all cases, whether judgment has been recovered or not, *where the debt sought to be garnished is for wages or salary, but not in other cases*, be printed or annexed to the summons served on the garnishee or garnishees. It had better be printed on the summons. If the memorandum does not state that the debt was incurred for board or lodging, the garnishee may presume that it was not so incurred. If not so incurred, there would be no exemption: Sinclair's D. C. Law, 1884, page 1. The object is to give such information to the garnishee as will enable him to say whether or not the primary debtor may be entitled to the \$25 exemption mentioned in Section 174 of this Act: Sinclair's D. C. Act, 1879, 152.

(v) Sinclair's D. C. Act, 1879, 152, 153.

It will be observed that this and the following Sections make provision for an attaching order being obtained, which, *when served*, shall have a certain effect. A proceeding by attaching order appears only to exist in a case where judgment has been recovered. Where judgment has not been recovered, a summons should be issued under Section 185.

one or more parties (naming them, or stating that he is unable to name them) is or are within this Province, and is or are indebted to the primary debtor, for an attaching order (which the Judge is hereby authorized to make), to the effect that all debts owing to the primary debtor, whether due or not due, be attached to satisfy the judgment; which order may be in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts. R. S. O. 1877, c. 47, s. 127.

Service thereof to bind all debts, etc.

Garnishee may pay in his own discharge.

179. (w) The service of the order on a garnishee shall have the effect (subject to the rights of other parties) of attaching and binding in his hands all debts then owing from him to the primary debtor, or sufficient thereof to satisfy the judgment, and a payment by the garnishee into the court, or to the primary creditor, of the debt so attached to the extent unsatisfied on the judgment, shall be a discharge to that extent of the debt owing from the garnishee to the primary debtor. R. S. O. 1877, c. 47, s. 128.

(w) Sinclair's D. C. Act, 1879, 147-157; D. C. Law, 1884, 261-266, and pages cited.

As has already been remarked in the notes to one of the previous Sections, it is the service of the order which gives efficacy to the garnishment. The mere issuing of it would not have the effect of binding the debt.

By the words of this Section it will be seen how necessary "the service of the order upon the garnishee" is to bind the debt.

In *Badeley v. Consolidated Bank*, 34 Ch. D., 536 (In Appeal, W. N., 1898, 30), it was held that an equitable charge given before a garnishee order was obtained took priority of the order, even in the absence of notice of the charge: See also 23 L. J. N. S., 189.

A debt *bona fide* assigned by the judgment debtor before attachment cannot be garnished: *Armstrong v. Douglas*, 24 L. J. N. S., 61, *per* Boyd, C.

180. (x) Any payment by the garnishee, after service on him of the order, to any one other than the primary creditor, or into court, to satisfy the judgment, shall to the extent of the primary creditor's claim, be void; and the garnishee shall be liable to pay the same again, to the extent of the primary creditor's claim, to satisfy the judgment. R. S. O. 1877, c. 47, s. 129.

Payment to any but primary creditor void.

181. (y) Whether such attaching order is or is not made, the primary creditor may cause to be sued out of the Division Court for the Division in which the garnishee, or one or more of them, if there be joint garnishees, resides or carries on business, a summons in the form prescribed by the General Rules or Orders, from time to time in force, relating to Division Courts, upon or annexed to which

Primary creditor may summon garnishee, etc.

If a garnishee, knowing that the debt is assigned, still pays over the debt in the attachment suit without notice to the assignee of the garnishment proceeding, we submit he could be compelled to pay the debt again, to the assignee, but if paid by compulsion of law without negligence on his part he could not be compelled to pay it a second time: *Turnbull v. Robertson*, 38 L. T. N. S., 389.

On the subject of garnishment generally, see *Sinclair's D. C. Act*, 1879, 147-157 and *Sinclair's D. C. Law*, 1884, 126-178; *Sinclair's D. C. Law*, 1885, 293, 294, and pages cited; *D. C. Act*, 1886, 140, 141, and pages cited, and p. 84 *ante*.

(z) *Sinclair's D. C. Act*, 1879, 153, 154.

D. C. Law, 1884, 261-266, and pages there referred to; *D. C. Law*, 1885, 293, 294, and pages there referred to; *D. C. Act*, 1886, 140, 141, and pages there referred to, and next previous note.

The reader is referred to these works and pages for an exposition of the law in reference to garnishment. In them the writer has tried to collect as many useful decisions on that subject as he possibly could. See also notes to Section 173, and the four following Sections; and page 84 *ante*, title "Attachment of Debts."

(y) *Sinclair's D. C. Act*, 1879, 154, and the works referred to in the next preceding section.

It will be observed that whether an attaching order is or is not made under Section 178, the primary creditor may cause to be issued out of the Division Court of the proper Division a summons as is here prescribed. The primary creditor has the option of pursuing one or other of the remedies, but where there are several garnishees the proceedings by an attaching order granted by the Judge is the most convenient, inexpensive and advisable to adopt.

shall be a memorandum shewing the names of the parties as designated in the judgment, the date when, and the Court in which, it was recovered, and the amount unsatisfied; which summons shall be returnable either at any ordinary sittings of the Court, or at such other time and place (to be named therein) as the Judge may permit or appoint, either by a general order for the disposal of such matters or otherwise. R. S. O. 1877, c. 47, s. 130.

Service
on corpor-
ation
whose
head
office is
not in the
Province.

182. (2) In proceedings under the preceding section, where the garnishees are likewise a body corporate, not having their chief place of business within the Province, then the summons mentioned in said last mentioned section shall be issued from the Division Court in which the judgment has been recovered, and shall be served upon the agent of the body corporate, whose office as such agent is either within the division in which the judgment has been recovered, or is nearest thereto. 47 V. c. 9, s. 3.

It is not imperative that the summons mentioned in this Section should be made returnable at any ordinary Sitting of the Court, but the Judge can appoint a different time and place for hearing it.

It will be further observed that this Section is only applicable to cases in which judgment has been entered.

Forms of Affidavit and Order will be found at pages 298, 299, of Sinclair's D. C. Act, 1879.

A substantial compliance with the requisites of the Section in question and those Forms should be observed: *Foster v Russell*, 12 Ont. R., 136, and at page 142; *Northcote v. Brunker*, 14 App. R., 364.

(s) Sinclair's D. C. Law, 1884, 33-38.

The views of the writer on this subject, and the practice to be observed in making service under this Section, will be found in the above pages fully discussed.

This Section has only application to cases "in which the judgment has been recovered." Where there is no judgment, provision is made for service of garnishee summons under Sections 185, 186, hereto.

183. (a) A copy of the summons and memorandum shall be duly served on the garnishee, or, if there be joint garnishees, then on such of them as are within the reach of the process, at the time and in the manner required for the service of summonses in ordinary actions for corresponding amounts, and also on the primary debtor, if thought advisable, or if required by the Judge. R. S. O. 1877, c. 47, s. 131.

Mode of
service.

184. (b) At the hearing of the summons, or at any adjourned hearing, on sufficient proof of the amount owing by the garnishee to the primary debtor, and no sufficient cause appearing why it should not be paid and applied in satisfaction of the judgment, the Judge may give judgment against the garnishee (which

Judg-
ment at
hearing.

(a) Sinclair's D. C. Act, 1879, 154, 155, 251, 252.

The writer's views on this Section will be found expressed at page 155 of the work already referred to.

Compare Section 100 hereto, and see notes to the same.

The words "if thought advisable" in this Section are of very doubtful meaning. It does not say by whom it may be "thought advisable." The writer cannot express any opinion as to what is the proper meaning to be given to these words. It is suggested, however, that they can only mean "if thought advisable" by the primary creditor, as provision is afterwards made if the Judge requires service to be made. Reference may also be made to Section 186 hereto, and to pages 156, 157, of Sinclair's D. C. Act, 1879.

It is submitted that if a primary creditor or garnishee be a person residing out of the Province (Ontario Glass Co. v. Swartz, 9 P. R., 252; Chicago, &c., R. R. Co. v. Myer, 11 West. Rep., 126), or dead before any process could be served upon him (*In re Easy. Ex parte Hill and Hymans*, 19 Q. B. D., 538), further proceedings could not properly be taken. See also Sinclair's D. C. Act, 1879, 275; McKay v. Palmer, 23 L. J. N. S., 358.

(b) Sinclair's D. C. Act, 1879, 155, 156.

The reader is referred to the remarks to the next preceding eleven Sections, and the authorities and works there referred to.

By D. C. Rule 56 (Sinclair's D. C. Act, 252) provision is made as follows: "If the garnishee or the primary debtor, having been served, does not appear on the return of such summons, judgment may be given against him by default; and if only some of the parties required to be served are served, the Judge may give the same judgment against those served as in ordinary cases."

It will thus be seen that, upon due service having been made, the Judge has power to enter judgment by default, as he would have under Section 110 hereof.

judgment may be in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts), for the amount so owing from him, or sufficient thereof to satisfy the judgment; and execution against the garnishee to levy the same, may issue thereon as of course, if due, or when and as it becomes due, or at such later period as the Judge may order, which execution may be according to the form prescribed as aforesaid. R. S. O. 1877, c. 47, s. 132.

*Where the Primary Creditor's Claim
not a Judgment.*

Where no
judg-
ment,
summons
on gar-
nishee,
etc.,
to issue.

130. (c) (1) Where judgment has not been recovered for the claim of the primary creditor, he may cause summons to be issued out of the Division Court of the Division in which the garnishee, or one or more of them, if there be joint garnishees, live or carry on business, in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, upon or annexed to which shall be a memorandum, shewing the names of the primary creditor, the primary debtor,

(c) Sinclair's D. C. Act, 1879, 156, 251, 252; D. C. Law, 1884, 261-266 and pages cited; D. C. Law, 1884, 17-42.

The writer's views on this Section will be found expressed in the above mentioned works and pages referred to. See also the notes to Section 173 *et seq.*

It will be observed that where the garnishees are a body corporate not having their chief place of business within the Province, and the claim not being a judgment, the summons shall be issued out of the Division Court "in which the cause of action arose," under sub-section 2 of this Section; but, under the first part of the Section, in other cases the summons must be "issued out of the Division Court of the Division in which the garnishee, or one or more of them if there be joint garnishees, live or carry on business." It will therefore be seen how different the jurisdiction is in the two cases. In the latter case the residence must be *bona fide*: *Baker v. Wait*, L. R., 9 Eq., 103; D. C. Law, 1885, 82. And the debt must be one due by a garnishee residing or carrying on business in the Division. The latter fact must be shewn, if required, to give jurisdiction: *In re Holland v. Wallace*, 8 P. R., 186.

and of the garnishee, and the particulars of the claim of the primary creditor, with reasonable certainty and detail; which summons shall be returnable as required by section 181 of this Act, in respect to the summonses therein mentioned. R. S. O. 1877, c. 47, s. 133.

(2) In the event of the garnishees being a body corporate, not having their chief place of business within the Province, then the summons shall be issued out of the Division Court for the division in which the cause of action arose, and shall be served upon the agent of the body corporate, whose office, as such agent, is nearest to the place where the cause of action arose. 47 V. c. 9, s. 2.

(3) Every person who within Ontario trans-acts or carries on any business of, or business for, such body corporate, shall for the purpose of this section and of section 182, be deemed the agent thereof. 47 V. c. 9, s. 4.

Whoto be
deemed
agent.

186. (d) A copy of the summons and memorandum shall be duly served on the garnishee, or if there be joint garnishees, then on such of them as are within reach of the process, at the time and in the manner required for service in ordinary cases; and also, if practicable, on the primary debtor, unless the Judge for sufficient reason dispenses therewith. R. S. O. 1877, c. 47, s. 134.

Service
on com-
panies.

(d) Sinclair's D. C. Act, 1879, 156, 157.

The views of the writer upon this Section will be found in the notes to Sections 100 and 183 of this Act.

Comparison may be made between Section 183 and Sinclair's D. C. Act, 1879, 155.

A Judge only can dispense with service on the primary debtor. We submit that a clear case would require to be made out before the Judge would be justified in dispensing with such service.

Judg-
ment in
such case.

187. (e) If in such case the primary debtor has been duly served with a copy of the summons and memorandum, judgment (in the usual form in other cases) may be given against him at the hearing for the primary creditor, for the whole, or such part of the claim as is sufficiently proved, and execution may afterwards issue thereon as in other cases; and whether such judgment is or is not given, the Judge, on sufficient proof of the debt due and owing from the primary debtor, and also of the amount owing to him from the garnishee, may then, or at any adjourned hearing, give judgment against the garnishee (which may be according to the form prescribed as aforesaid) for the amount so found due from the garnishee, to the extent of the amount so found due from the primary debtor, which sum the garnishee shall pay into court, or to the primary creditor, towards the satisfaction of the claim, or in default thereof, execution may issue to levy the same forthwith, or at such later period as the Judge may direct, which execution may be according to the form prescribed as aforesaid. R. S. O. 1877, c. 47, s. 135.

(e) Sinclair's D. C. Act, 1879, 157.

This Section provides how judgment may be entered in garnishment cases.

It is submitted that a person under twenty-one years of age might be garnished. The right to set up the plea of infancy would belong to himself. It is personal, and he alone can take advantage of it, but he may choose not to do so: See page 101 *ante*, title "Infant."

So also a married woman would be subject to judgment as a garnishee. Her separate property, however, would only be bound: *Palliser v. Gurney*, 19 Q. B. D.; 519. See Sinclair's D. C. Law, 1885, 66-77, and 302-305 and pages there referred to; *Scott v. Morley*, 20 Q. B. D., 120.

The Form of judgment against a married woman in action of contract will be found at page 75 of the work last cited. Judgment against her as a garnishee could easily be adapted.

The subject of a married woman's liability under the Ontario Act of 1884 R. S. O., Chap. 132, will also be found discussed in different parts of this work under the subject of "Married Woman," and at the pages just given of the work last cited.

General Provisions.

188. (f) (1) In cases under this Act, and whether the claim of the primary creditor is or is not a judgment, the primary debtor, the garnishee and all other parties in any way interested in, or to be affected by the proceeding, shall be entitled to set up any defence, as between the primary creditor and the primary debtor, which the latter would be entitled to set up in an ordinary action, and also any such defence as between the garnishee and the primary debtor, and may also shew any other just cause why the debt sought to be garnished should not be paid over or applied in or towards the satisfaction of the claim of the primary creditor. R. S. O. 1877, c. 47, s. 136 (1).

All parties
may shew
cause
etc.

(2) A primary debtor or garnishee who desires to set up a statutory or other defence or set-off or to admit his liability in whole or in part for the amount claimed in such action shall file with the clerk the particulars of such defence or set-off, or an admission of the amount due or owing by the primary debtor or the garnishee, as the case may be, within eight days after service on him of the summons, and the clerk shall forthwith send by mail to each of the said parties to the action a copy of such defence, set-off or admis-

Defences
in gar-
nishee
proceed-
ings.

(f) Sinclair's D. C. Act, 1879, 157-159.

D. C. Act, 1880, 119, and pages there cited; D. C. Act, 1886, 33-44, 140, 141, and pages there referred to; D. C. Law, 1884, 261-266, and pages there referred to; D. C. Law, 1885, 293, 294.

Provision is here made for all parties interested to have the right to defend; so also has any one the same right who may be affected by the proceeding. To a large extent this would, it is submitted, be a Common Law right independently of the enactment: *In re Pollard*, L. R., 2 P. C., 106; *Sinclair's* D. C. Act, 1879, 127, 155, 223. But, any way, the Section is large enough to allow any defence to be set up that would be allowed "in an ordinary action."

All parties, too, have the right to shew any other just cause why the debt

sion, and the primary creditor may file with the clerk a notice that he admits the defence or set-off or accepts the admission of liability as correct; a copy of the notice shall be sent by the clerk by mail, forthwith to the garnishee, and in the absence of any notice of defence or set-off, from any primary debtor or garnishee, the Judge may, in his discretion, give judgment against such primary debtor or garnishee; and in the event of the primary creditor failing to file a notice admitting or rejecting such defence, set-off or admission of liability, the garnishee shall not be bound to attend at the trial, and the sum admitted to be due or owing by the garnishee, shall be taken to be the correct amount of his liability unless the Judge shall otherwise order, in which latter case the garnishee shall be notified by the clerk and shall have an opportunity of attending at a subsequent date and being heard before judgment is given against him.

Costs. (3) The costs of all notices required to be given under this section, shall be costs in the cause, and in no case shall be payable by the garnishee, unless specially ordered by the Judge. 49 V. c. 15, s. 12.

sought to be garnished should not be paid over or applied in or towards the satisfaction of the claim of the primary creditor. This must mean all parties who have any interest in the matter. The effect of Creditors' Relief Act: See 24 L. J. N. S., 87.

Sub-section (2) prescribes the procedure to be adopted in garnishment proceedings. The requirements here prescribed were not always so, but, in a great measure were introduced in the year 1886. Reference to the works above mentioned will shew the course of legislation.

A Form of order bringing third parties before the Court where they claim the money will be found at p. 282 of Sinclair's D. C. Law, 1885, and among the Forms, *post*.

In regard to the defence of the Statute of Limitations in garnishment and other cases, see D. C. Act, 1886, 33-44.

189. (g) In all cases under this Act, (except where an attaching order has been served, already provided for), service of the summons on the garnishee shall have the effect of attaching and binding in his hands (subject to the rights of other parties), the debt sought to be garnished, from the time of the service until a final decision made on the hearing of the summons; and any payment of the debt by the garnishee during such period, to any one other than the primary creditor, or into court for satisfying his claim shall, to the extent of the claim be void, and the garnishee shall be liable to pay the same again to the extent of the claim to satisfy the same, unless the Judge otherwise orders. R. S. O. 1877, c. 47, s. 137.

Service of
summons
on gar-
nishee to
bind debt
until
hearing.

190. (h) If judgment be given for the primary creditor against the garnishee, the debt garnished shall, unless the Judge otherwise orders, continue bound in the hands of the

and after
judg-
ment.

(g) Sinclair's D. C. Act, 1879, 160.

This Section declares the effect of service of the summons on the garnishee upon the debt sought to be garnished. It will be observed that the service of the summons only binds from the time of the service. The works, pages and cases cited in the previous notes to Section 173, upon garnishment, may be referred to.

It will be seen that the garnishee would pay over the money to any one but the primary creditor or into Court at his peril.

The debt is bound by the garnishment "until a final decision is made on the hearing of the summons." Should the hearing of the matter be adjourned until another sitting, the garnishment would still hold. Judgment against the primary debtor and the garnishee may be rendered at different times, but there must be a judgment against the primary debtor before anything can be awarded against the garnishee: See notes to Section 173. Drake on Attachment, 5th Ed., ss. 228, 262, 658. Dividends on an Insolvent Estate are garnishable: 24 L. J. N. S., 92.

(h) Sinclair's D. C. Act, 1879, 161.

This Section goes on to provide for the security of the primary creditor after judgment.

The debt garnished continues to be bound after judgment, unless the Judge otherwise orders, and any payment made by the garnishee except as directed by this Section, or the leave of the Judge, would be void, and the garnishee would

garnishee to satisfy the claim of the primary creditor: and payment in such case by the garnishee of the debt to the extent of the claim, either into Court or to the primary creditor, shall, to that extent, be a discharge to the garnishee, as between him and the primary debtor: and any payment thereof, otherwise than last aforesaid, except by leave of the Judge, shall be void: and the garnishee in such case shall be liable to pay the same again to satisfy the claim of the primary creditor. R. S. O. 1877. c. 47, s. 138.

Costs.

191. (i) The garnishee shall not be liable for the costs of the proceeding, unless and in so far only as occasioned by setting up a defence, which he knew, or ought to have known, was untenable; and, subject to this provision, the costs of all parties shall be in the discretion of the Judge. R. S. O. 1877. c. 47, s. 139.

Costs of
primary
creditor.

192. (j) The Judge in any case brought to garnish a debt, may, in giving judgment on behalf of the primary creditor, award the costs of the proceeding to the primary creditor out

be liable to pay the same again for the purpose of satisfying the primary creditor the amount of his claim. See also notes to Sections 173 and 180 hereto.

(i) Sinclair's D. C. Act, 1879, 161.

Provision is here made for the costs of the proceedings. The garnishee is not liable for costs unless he has occasioned expense by setting up a defence which he knew or ought to have known was untenable.

But, subject to this provision, the costs of all parties shall be in the discretion of the Judge. Whether or not the garnishee should be made to pay costs is a matter for the determination of the Judge alone.

(j) Sinclair's D. C. Act, 1880, 98-101.

The reasons for originally enacting this Section will be found at the pages of the work just referred to.

Before the year 1880 the Judge had no power to award costs against the primary debtor out of the amount found due from the garnishee to the primary creditor. Now, if there is enough in the hands of the garnishee to pay the costs of the primary creditor it may be ordered to be applied in that way.

of the amount found due from the garnishee to the primary debtor, anything in this Act to the contrary notwithstanding. 43 V. c. 8, s. 65.

193. (k) Judgment shall not be given either against the primary debtor or the garnishee until the said summons and memorandum, with an affidavit of the due service of both on the proper parties, are filed, unless the Judge for special reasons orders otherwise. R. S. O. 1877, c. 47, s. 140.

Summons and memorandum of particulars to be filed.

194. (l) No execution shall in any case issue to levy the money owing from any garnishee until and so far only as such money has become fully due. R. S. O. 1877, c. 47, s. 141.

No execution till garnishee's debt due.

195. (m) Any party entitled to or interested in any money or debt attached or bound in the hands of the garnishee by a proceeding under this Act, may, at any time before actual payment thereof by the garnishee, apply to the Judge for an order (which the Judge is

Application to discharge debt from attachment.

(k) Sinclair's D. C. Act, 1879, 161.

This Section requires the service of the summons and the memorandum to be duly proved by affidavit, but power is given to the Judge to dispense with such if special reasons are shewn. Proof of loss of the papers or other accident would probably be what the Section contemplates.

(l) Sinclair's D. C. Act, 1879, 162.

Provision is here made that execution shall not issue against a garnishee any sooner than he could have been called upon to pay at the instance of the primary debtor under his contract with him.

Independently of this Section the order for payment would not have been otherwise granted: *Tapp v. Jones*, L. R., 10 Q. B., 591.

(m) Sinclair's D. C. Act, 1879, 162.

The language of this Section is very wide. Any party entitled to or interested in the money garnished shall have a right to apply at any time that such money be discharged from the claim of the primary debtor. Should there be several garnishments against the same fund, a second garnishee would have the right to apply under this Section to set aside a previous garnishment proceeding. An assignee of the debt would also have that right. In fact, any person who could shew a legal claim upon the money or debt garnished could

hereby authorized to make), to the effect that such money or debt be discharged from the claim of the primary creditor; and thenceforth such money or debt shall cease to be attached or bound for such claim; and such an application and such an order may also be made, if the Judge thinks fit, after the money or debt has been paid over by the garnishee, in which case all parties shall be remitted to their original rights in respect thereto, except as against the garnishee having already paid the debt or money, whose payment shall not be affected thereby, but shall be and remain an effectual discharge to him. R. S. O. 1877, c. 47, s. 142.

Security
from
primary
creditor.

196. (n) (1) If the Judge, on the hearing of a summons under this Act, or on special application for the purpose, thinks proper, he may, before giving judgment against the garnishee, or at any time before actual payment by the garnishee, order such security to be given as may be approved by himself or the clerk, by or on behalf of the primary creditor, for the repayment into court to abide the Judge's order, in case a Judge's order is made for repayment.

take the benefit of this Section. An order could be made even after the money or debt had been paid over by the garnishee, and the parties could be remitted to their original rights in respect to it, except as against the garnishee who had *bona fide* paid the money in pursuance to the garnishment proceeding.

(n) Sinclair's D. C. Act, 1879, 162, 163.

A salutary power is here given to the Judge for the protection of a garnishee. He may order that a bond shall be given to the Clerk of the Court to enure for the benefit of all parties interested in or entitled to the money. The object of this bond would in many cases be desirable if the debt should be *bona fide* assigned and the assignee had not given notice of the assignment, and which he would not be bound to do, his rights might be prejudiced by the garnishment proceeding without his knowledge or being made a party to the suit. This is one of the contingencies for which the Section under consideration is intended to provide. For Form of bond see Sinclair's D. C. Act, 1879, 301.

(2) The bond shall be to the clerk by his name of office, and shall enure for the benefit of all parties interested in or entitled to the money, and may by order of the Judge, and on such terms as to indemnity against costs and otherwise as he may impose, be sued in the name of the clerk of the court for the time being, for the benefit of the party entitled. R. S. O. 1877, c. 47, s. 143.

197. (c) In case any one other than the primary creditor or primary debtor claims to be entitled to the debt owing from the garnishee, by assignment thereof or otherwise, the Judge, when adjudicating in any of the cases aforesaid, or by calling the proper parties before him by summons for the purpose, may enquire into and decide upon the claim, and may allow or give effect to it, or may hold it void as against the primary creditor for being a fraud upon creditors or otherwise, as the justice of the case may require; and for such purpose he may require the attendance of such parties and witnesses (their conduct money being first paid) as he may think necessary. R. S. O. 1877, c. 47, s. 144.

Case of
adverse
claims.

(c) Sinclair's D. C. Act, 1879, 163; D. C. Act, 1880-98-101.

This is what is known as the "Third Parties' Clause," and allows the Judge to amend the proceeding by calling the proper parties before him by summons for the purpose. He then may enquire into and decide upon the claim, and may allow and give effect to it. He can even consider whether this claim is void as against the primary creditor for being a fraud upon creditors or otherwise. For instance, should there be an assignment of the debt which under general law would be void as fraudulent or preferential, so also could it be urged under this Section that the rights of a primary creditor would be unaffected by such assignment: *River Stave Co. v. Sill*, 12 Ont. R., 557; R. & J., 1583-1612, 4501; Ont. Digest, 1881, 292; Ont. Digest, 1887, 282; 3 Mewa's Digest, 1882-1899.

For Form of order see Sinclair's D. C. Law, 1886, 282, and Forms post.

Judge
may
postpone
or ad-
journ pro-
ceedings.

198. (p) The Judge may postpone or adjourn from time to time, the hearing and other proceedings in garnishee cases, to allow time for giving omitted notices of defence, or to produce further evidence, or for any other purpose; and may require service on; and notice to, other or additional parties, and may prescribe and devise forms for any proceeding, and may amend all summonses, memoranda, claims, accounts, notices and other papers and proceedings, and copies thereof as justice may require. R. S. O. 1877, c. 47, s. 145.

Debt at-
tachment
book

199. (q) The Clerks of the several Division Courts shall keep in their respective offices a debt attachment book, according to the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, in which shall be correctly entered the names of parties, the dates, statements, amounts and other proceedings under this Act, as indicated by the said form, and copies of any entries made therein may be taken by any one on application free of charge. R. S. O. 1877, c. 47, s. 146.

(p) Sinclair's D. C. Act, 1879, 164.

Extensive power is also given to the Judge under this Section for the postponement or adjournment from time to time of the hearing or other proceedings in garnishee cases. It may be said that the power of the Judge under this Section is only limited by his proper discretion and as justice may require.

The Judge has in Division Court proceedings generally very full powers in regard to adjournment of cases and the amendment of proceedings, but in these garnishee cases more than ordinary discretion is by this Section conferred, even to the granting of new trials after the expiration of 14 days if justice requires it: *McLean v. McLeod*, 5 P. R., 467.

(q) Sinclair's D. C. Act, 1879, 164.

The words here used are imperative. The Clerks "*shall keep*" in their respective offices the prescribed books, and the entries *shall be* correctly entered in the same.

The better opinion would seem to be that a certified copy of the entries in this book would not of itself be evidence of the contents of the book. Parties are allowed to make a copy of the entries, but such are not by the Statute made *prima facie* evidence of their contents.

ARBITRATION.

200. (r) The Judge may, in any case, with the consent of both parties to the action, or of their agents, order the same, with or without other matters in dispute between such parties, being within the jurisdiction of the court, to be referred to arbitration to such person or persons, and in such manner and on such terms as he thinks reasonable and just; or the parties to an action, may by writing, signed by themselves or their agents, agree to refer the matters in dispute to the arbitrament of a person named in the agreement, which shall be filed with the clerk, and be entered on the Procedure Book as notices are entered. R. S. O. 1877, c. 47, s. 147; 49 V. c. 15, s. 13.

Refer-
ence to
arbitra-
tion by
order of
Judge or
by con-
sent.

(r) Sinclair's D. C. Act, 1879, 164-167; Sinclair's D. C. Act, 1886, 45-49.

The right of parties to reference applies to all cases in the Division Courts. Certain prerequisites exist. First, the parties must consent to arbitration, either by themselves or their agents. Not only the case, but other matters in dispute between the parties within the jurisdiction of the Court, if they wish them, may be referred to such person or persons and in such manner and on such terms as the Judge thinks reasonable and just.

A new provision was introduced in the Act of 1886 (now consolidated with this Section) that the parties might, by written consent, by themselves or their agents, agree to refer the matters in dispute to the arbitration of a person named in the agreement; the agreement shall be filed with the Clerk of the Court and be entered in the Procedure Book as notice is required to be entered.

In addition to the cases and authorities cited at the pages of the works referred to, the reader is referred to R. & J., 114-187, 4224-4233; Ont. Digest, 1884, 12; Ont. Digest, 1887, 12; Russell on Awards, last Ed.; 1 Mews' Digest, 220-417.

Some difficulty may arise as to the right of the Judge to enlarge the time for making an award in the Division Court beyond that specified in the reference. No express power for that purpose is given, and, unless it is conferred by Section 201, by which it is declared that the reference would not be revocable by either party except with the consent of the Judge, it does not appear in the Statute.

At Common Law the fraudulent, improper or malicious conduct of the arbitrator alone, without any coercion of the person seeking to enforce award, is no defence to an action upon the award: *Norvall v. the Canada Southern Ry. Co.*, 16 L. J. N. S., 58; 5 App. R., 13, 16, S. C.

In *Whitely v. McMahon*, 32 C. P., 458, it was held that the award was bad and must be set aside, as it appeared that the arbitrators had received the evidence of one of the parties in the absence of the others, and after the arbitration was supposed to be closed. *Held* also, that although the finding as to

costs was unauthorized in that case it was separable from the rest of the award, and that part only as to costs was invalid.

Under the Municipal Law it was held that an award made after the expiry of one month after the appointment of the arbitrators would invalidate it: *Thurlow v. Sidney*, 29 Grant, 497. Witnesses must be examined by them unless there is a positive agreement or consent to the contrary. Such consent or agreement may be outside of the submission, but it cannot be inferred from the absence of objection or mere acquiescence: *In re Rushbrook and Starr*, 46 U. C. R., 73.

Where the submission shows that the third man is really a third arbitrator, and not an umpire, the use of the word umpire in the submission must be rejected as surplusage, and that the award was held invalid because it was not made by all three arbitrators: *Willson v. York*, 46 U. C. R., 289.

As to the neglect or refusal to appoint an arbitrator, see *Direct U. S. Cable Co. v. Dominion Telegraph Co.*, 8 App. R., 416.

As to a reference back to the arbitrators of the matter referred, see *Moore v. Buckner*, 28 Grant, 606.

Where a reference provides as to the costs, the arbitrator has no power to make any disposition of them: *DeVannev v. Dorr*, 4 Ont. R., 206; *Re Harding and Wren*, 4 Ont. R., 605. But if separable, the award as to them does not render the other parts of the award bad. *Idem*.

As to the certificate of an engineer under a contract, see *Canty v. Clark*, 44 U. C. R., 222.

Where the arbitrators have made two imperfect awards, both referred back to them, the Court refused to refer the case again to them: *In re Albermarle v. Eastnor*, 46 U. C. R., 183.

Reference may be made where the dispute arose under an agreement to serve the defendant to: *Blake v. Kirkpatrick*, 6 App. R., 212.

A compulsory reference may now be made in the High Court of Justice where one item of the plaintiff's claim is properly the subject of reference: *Knight v. Coales*, 19 Q. B. D., 296.

The pendency of another action for the same cause in a foreign jurisdiction does not form a ground of obligation to stay the arbitration: *The Direct United States Cable Co. (Limited) v. The Dominion Telegraph Co. of Canada*, 8 App. R., 416.

Where the costs are separable from the other part of the award, see *Re Egleston v. Taylor*, 45 U. C. R., 479; *Re Harding and Wren*, 4 Ont. R., 605.

The improper reception or rejection of evidence by the arbitrators without any corrupt intent does not amount to illegal misconduct upon which the award will be set aside: *Webster v. Haggart*, 9 Ont. R., 27.

As to communications with arbitrators after the evidence is closed, see *Herring and Napanee, Tamworth and Quebec R. W. Co.*, 5 Ont. R., 349.

Where in effect the application was to make a new award, the Court held that there was no jurisdiction: *Vernon v. Oliver*, 11 Sup. R., 156.

Enlargement of the time cannot be made unless a power to do so was expressly reserved; but under the English Common Law Procedure Act, as also under ours, the power of enlargement by the Judge existed even though the time for making the award had expired: *Denton v. Strong*, L. R., 9 Q. B., 117.

It will be seen from the case of *May v. Harcourt*, 13 Q. B. D., 688, that the power of the Court to enlarge the time was entirely given by the Statute. On the same subject we also refer to *Lord v. Lee*, L. R., 3 Q. B., 404; *Denton v.*

201. (s) The reference shall not be revocable by either party, except with the consent of the Judge. R. S. O. 1877, c. 47, s. 148.

Revoca-
tion of
reference.

Strong, L. R., 9 Q. B., 117. See also Ward v. The Secretary for War, 32 L. J. Q. B., 53.

In *Oakes v. The City of Halifax*, 4 Sup. R., 640, it was held that where parties, through their respective attorneys in the action, consented to extend the time for making an award under the rule of reference, that such consent did not operate as a new submission but as an enlargement of the time under the rule and a continuation to the extended period of the authority of the arbitrators, and, therefore, an award made within the extended period was so made under the rule of reference and was valid and binding on the parties; that it made no difference that one of the parties to the reference was a municipal corporation. It was further held in that case that, where in the Court of Appeal certain grounds of objection were taken, no other ground of objection to the award could be raised on Appeal.

The permitting of officers of a company (the defendants) to be present and take part in the deliberations of the arbitrators was such improper conduct as to render the award bad: *Re Hubbard v. The Union Fire Ins. Co.*, 44 U. C. R., 391.

In support of the rule that the award must be executed in the presence of all the arbitrators, see *Anglin v. Tuckle*, 30 C. P., 72.

As to the necessity of the arbitrators executing the award together: *Nott v. Nott*, 5 Ont. R., 283.

Where, in effect, the application is to make a new award, the Court held that there was no jurisdiction: *Vernon v. Oliver*, 11 Sup. R., 156.

Costs of arbitration to award, where proceedings stayed in an action on a policy of insurance pending arbitration as to the amount of loss, see *Hughes v. The British America Ins. Co.*, and *Hughes v. The London Assurance Co.*, 7 Ont. R. 465; *Hughes v. The Hand-in-Hand Ins. Co.*, 7 Ont. R., 615.

In addition to the pages of Sinclair's D. C. Act, 1879, already referred to, the reader is particularly directed to pages 45-49 of Sinclair's D. C. Act, 1886.

A Form of order of reference with the clauses most usually inserted will be found at pages 48 and 49 of the last mentioned work, and *post*.

On the general subject of Arbitration and Award, see Russell on Awards, last Ed.; 1 Mews' Digest, 222, 417.

If a cause is referred to arbitration in the Division Court, there is no appeal to the High Court of Justice against it: *Mayer v. Farmer*, 3 Ex. D., 235; *McColl v. Waddell*, 19 C. P., 213; *Pardee v. Lloyd*, 5 App. R., 1.

(s) Sinclair's D. C. Act, 1879, 168, 169.

It is certain that under this Section a reference to arbitration duly made is not revocable by either party except with the Judge's consent. Whether this means that it shall not be so revocable during the time within which the award should be made, or after the expiry of such time, is a matter of doubt. The writer is of the opinion that the Section has only reference to a revocation by either party during the existence of the reference, and not after its expiry. See *East and West India Docks Co. v. Kirk & Randall*, 12 App. Cas., 738.

Award to
be enter-
ed as the
judg-
ment.

202. (t) The award of the arbitrator or arbitrators or umpire shall be entered as the judgment in the cause, and shall be as binding and effectual as if given by the Judge. R. S. O. 1877, c. 47, s. 149.

Judge
may set
aside
award.

203. (u) The Judge, on application to him within fourteen days after the entry of the award, may, if he thinks fit, set aside the award, or may, with the consent of both parties, revoke the reference and order another reference to be made in the manner aforesaid. R. S. O. 1877, c. 47, s. 150.

Arbitra-
tors may
also ad-
minister
oaths.

204. (v) Any of the arbitrators may administer an oath or affirmation to the parties, and to all other persons examined before such arbitrator. R. S. O. 1877, c. 47, s. 151.

(t) Sinclair's D. C. Law, 1879, 169.

At Common Law a reference was revocable by either party before award made: *Fraser v. Ehrensperger*, 12 Q. B. D., 310.

The writer has given his views fully at the page of the work just cited. In addition thereto the reader is referred to *Moore v. Buchner*, 28 Grant, 606; *Norvall v. Canada Southern Ry. Co.*, 5 App. R., 13; *Cameron v. The Toronto Corn Exchange*, 5 App. R., 268; *Essery v. Court Pride of the Dominion*, 2 App. R., 596.

(u) Sinclair's D. C. Act, 1879, 170.

The application to the Judge to set aside the award must be made within fourteen days after the entry by the Clerk of such award. He would have no power to extend the time or to entertain an application after such time. The Judge could, with the consent of both parties, revoke the reference and order another reference to be made in the manner pointed out by this Statute.

It would be useless to attempt to lay down any general rule as to what grounds application could be made to set aside the award. We can only refer the reader to the different cases which will be found in *Russell on Awards* and the other works cited in the notes to Section 200.

(v) Sinclair's D. C. Act, 1879, 170.

Power is here given to administer an oath or affirmation to the parties to the suit and to all other persons examined before the arbitrator. Without this power it is possible that the authority of the arbitrators fully to investigate the matters in dispute would not be complete.

CONFESSIONS OF DEBT.

205. (w) A bailiff or clerk, before or after action commenced, may take a confession or acknowledgment of debt from a debtor or defendant desirous of executing the same, which confession or acknowledgment shall be in writing and witnessed by the bailiff or clerk at the time of the taking thereof; and upon the production of the confession or acknowledgment to the Judge, and its being proved by the oath of the bailiff or Clerk, judgment may be entered thereon. R. S. O. 1877, c. 47, s. 152.

Clerks and bailiffs may take confessions.

206. (x) The oath or affidavit shall state that the party making it has not received, and that he will not receive, anything from the plaintiff or defendant, or any other person, except his lawful fees, for taking the confession or acknowledgment, and that he has no interest in the demand sought to be recovered. R. S. O. 1877, c. 47, s. 153.

Affidavit required in such cases.

(w) Sinclair's D. C. Act, 1879, 170, 171.

It will be observed that in Division Court procedure the right to take an acknowledgment or confession of debt from a debtor under this Section must be by a Clerk or Bailiff. No other person appears to have such right. The Clerk or Bailiff must also prove by his own oath the execution of such confession or acknowledgment.

The confession or acknowledgment executed in any other form than here prescribed (Sinclair's D. C. Act, 1879, 268, 322, 324,) would operate as an admission of the party of the contents of the instrument, but could not properly be acted upon as a confession. The general opinion is that a confession in the Division Court has not the effect that the same instrument would have under Chapter 124 of the R. S. O.

(x) Sinclair's D. C. Act, 1879, 171.

This Section prescribes that the Clerk or Bailiff making the affidavit required by the 205th Section shall swear that he will not receive anything from the plaintiff or defendant or any other person except his lawful fees; that he has not received the same; and that he is not interested in the payment sought to be recovered.

It is intended here to make the officer who takes the confession perfectly independent, so far as the oath can make him: Sinclair's D. C. Act, 1879, 171, 172.

COSTS.

Judge's
authority
as to
costs.

207. (y) (1) The costs of any action or proceeding not otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Judge thinks fit, and in cases where the plaintiff does not appear in person or by some person in his behalf, or appearing does not make proof of his demand to the satisfaction of the Judge, he may award to the defendant such costs and such further sum of money, by way of satisfaction for his trouble and attendance as he thinks proper, to be recovered as provided for in other cases under this Act, and in default of any special direction, the costs shall abide the event of the action, and execution may issue for the recovery thereof in like manner as for any debt adjudged in the court. R. S. O. 1877, c. 47, s. 154.

(2) In all actions or other proceedings brought in a Division Court in which the plaintiff fails to recover judgment by reason of the Court having no jurisdiction over the subject matter thereof, the Judge presiding in the Court shall have jurisdiction over the costs of the action or other proceeding, and

(y) A very wide discretion is here given to the Judge on the subject of costs, but it only applies in such cases where special provision is not otherwise made. It would not apply to such cases as are provided for under Section 124 and cases of a similar nature.

If the plaintiff does not appear on the day of hearing, or, if appearing, does not make proper proof of his demand to the satisfaction of the Judge, costs may be awarded to the defendant and also such further sum of money by way of satisfaction for his trouble and attendance as the Judge thinks proper.

This part of the Section as to awarding costs to the defendant in such cases would now seem unnecessary, the parties being now allowed to give evidence on their own behalf—in view of the cases mentioned at pages 327 and 328 of Sinclair's D. C. Act, 1879, and *Fox v. The Toronto & Nipissing Ry. Co.*, 7 P. R., 167.

may order by and to whom the same shall be paid, and the recovery of the costs awarded to be paid may be enforced by the same remedies as the costs in the actions or proceedings within the proper competence of the Court are recoverable. 44 V. c. 5, Rule 489.

208. (2) Where in a contested case for Counsel Fees more than \$100, a counsel, solicitor or agent has been employed by the successful party in the conduct of the cause or defence, the Judge may, in his discretion, direct a fee of \$5, to be increased according to the difficulty and importance of the case, to a sum not exceeding \$10, to be taxed to the successful party, and the same, when so allowed, shall be taxed by the clerk and added to the other costs. 43 V. c. 8, s. 16.

Should no special direction be made as to costs, they would abide the event. The like proceedings may be taken for costs awarded as in ordinary cases.

The second sub-section of this Act apparently was intended to get over the difficulty which is pointed out in Sinclair's D. C. Act, 1879, 179, and was intended to remove any further doubts which existed as to the right of a Judge to award costs against the plaintiff where an objection to the want of jurisdiction was sustained.

(2) Sinclair's D. C. Act, 1880, 35, 36.

The writer has little to add to the opinion expressed in the pages above referred to. It has been argued by some that the words "contested case" mean not only a case in which there is a contest in Court, but one in which notice of defence has been entered simply. The writer has always thought otherwise, and when we consider that, since the year 1880, a clause was introduced in one of the Division Court Bills before the Legislature, allowing the Judge in his discretion to grant what may be termed counsel fee in all cases within this Section in which a defence was entered, and the House of Assembly refused to pass it, there cannot be much doubt of their intention under this Section. It was intended to obviate the difficulty which the writer and other Judges had held in regard to the meaning of these words. It is true that in many cases it may be said there is a contest, although the party may not appear in Court, yet we still think the Statute was not intended to meet such cases. There is great force in the argument that in preparing the case for trial the fee is virtually earned whether the defendant appears at the trial or not; but we think it must be addressed to the Legislature, rather than to the right of the Judge, to allow a fee.

For form of fiat where a fee is allowed, see Sinclair's D. C. Act, 1880, 36, and Forms, *post*.

Costs of
witnesses
in certain
cases.

209. (a) Where the defendant having disputed the plaintiff's claim afterwards and before the opening of the court confesses judgment or pays the claim so short a time before the sitting of the court that the plaintiff cannot in the ordinary way be notified thereof, and without such notice the plaintiff *bona fide* and reasonably incurs expenses in procuring witnesses or in attending at court, the Judge may, in his discretion, order the defendant to pay such costs or such portion thereof as to him may seem just. 43 V. c. 8, s. 63.

Costs in
actions
on judgments.

210. (b) No costs shall be recoverable in an action brought in any Court for the recovery of a sum awarded by judgment in a Division Court without the order of the Judge of the Court in which the action is brought, on sufficient cause shewn. R. S. O. 1877, c. 47, s. 216.

(a) Sinclair's D. C. Act, 1880, 98.

This Section is intended to cover all classes of cases in which the plaintiff may be put to expense by the defendant and which he might not otherwise be able to recover.

It will be observed that provision is here made for a case where the plaintiff *bona fide* and reasonably incurs expense in procuring witnesses or in attending Court or otherwise; the Judge may in his discretion order the defendant to pay the same or such portion of it as to him may seem just.

Without the aid of this Section we do not see how the defendant could escape the payment of these costs. In any such case, however, this Section fully protects the plaintiff.

(b) Sinclair's D. C. Act, 1879, 221.

If, for some reason best known to the plaintiff himself, an action is brought in another Court for the recovery of the sum awarded him by judgment of a Division Court, the defendant shall not be charged with a double set of costs except upon the order of the Judge of the Court in which the second action is brought, on sufficient cause shewn to him.

Sometimes a party is anxious to pursue a course and obtain a remedy which the Division Court does not afford. If he does so he must pay the costs himself, unless he can convince the Judge on sufficient cause that he should be allowed his costs of the second action.

As there can be no adverse order for costs unless expressly authorized by Statute, we submit that an order under this Section could not be made except where the opposite party had an opportunity of being heard.

PROCEEDINGS NOT TO BE SET ASIDE FOR
MATTER OF FORM.

211. (c) No order, verdict, judgment, or other proceeding had or made concerning any matter or thing under this Act, shall be quashed or vacated for any matter of form. R. S. O. 1877, c. 47, s. 155.

Proceed-
ings not
to be
quashed
for want
of form.

JUDGMENT AND EXECUTION.

212. (d) In case the Judge makes an order for the payment of money, and in case of default of payment of the whole or of any part thereof, the party in whose favour the order has been made, may sue out execution against the goods and chattels of the party in default; and thereupon the clerk, at the request of the party prosecuting the order, shall issue under

When
money
not paid,
pursuant
to order
execution
to issue.

In *Lomax v. Berry*, 2 H. & N., p. 128, MARTIN, B., expressing the views of CROMPTON, WILLES, B. B., and himself on the Section of a Statute of which this very closely resembles, in speaking of a previous case on this point, says: "We arrived at the conclusion that it was a matter of principle that a summons must issue before a hostile order for costs could be made." See also *Har. C. L. P. Act*, 2nd Ed., 425, 426.

(c) *Sinclair's D. C. Act*, 1879, 172.

As will be seen by a reference to the page referred to of the above work, mere omissions of form were not intended to invalidate any proceeding in a Division Court.

If there has been a substantial decision of any cause, matter or thing, or any order, verdict or other proceeding had or made of or concerning any matter or thing under the Act, it shall not be quashed or vacated for any matter of form: *Oliphant v. Leslie*, 24 U. C. R., 398; *Crawford v. Beattie*, 39 U. C. R., 28.

The intention is to hold all Division Court proceedings good against any objections of a technical nature.

(d) *Sinclair's D. C. Act*, 1879, 172-179.

In addition to the pages above referred to, the writer has to add the following cases on the subject of judgment and execution:

A writ of execution issued too soon would not be a nullity but an irregularity only: *Macdonald v. Crombie*, 2 Ont. R., 243.

As to what amounts to a seizure, see *May v. The Standard Fire Ins. Co.*, 5 App. R., 605.

As to property liable to seizure, see *Oliver v. Newhouse*, 32 C. P., 90; 8 App. R., 122; R. S. O. 733-737, 1210, 1886. And as to what is exempt, see R. S. O., 731-734, 2086.

the seal of the court an execution to one of the bailiffs of the court, who by virtue thereof shall levy by distress and sale of the goods and chattels of such party, being within the county within which the court was holden, such sum of money and costs (together with interest thereon from the date of the entry of the judgment) as have been so ordered, and remain due and shall pay the same over to the said clerk. R. S. O. 1877, c. 47, s. 156.

Where a writ of execution is not renewed, but not through any default of any officer of the Court, it will not be renewed *nunc pro tunc*: *Lowson v. The Canada Farmer's Mutual Ins. Co.*, 9 P. R., 309.

An expired execution cannot be renewed: *Sinclair's D. C. Law*, 1884, 97; *Sinclair's D. C. Act*, 1886, 119; *Macdonald v. Crombie*, 11 Sup. R., 109; *Barker v. Palmer*, 4 Q. B. D., 9; *Doyle v. Kaufman*, 3 Q. B. D., 7; *Neilson v. Jarvis*, 13 C. P., 192, 193; *Price v. Thomas*, 11 C. B., 543; *Cole v. Sherard*, 11 Ex., 492; *Smaillage v. Tonge*, 17 Q. B. D., 644.

As to the abandonment of an execution, see *Patterson v. McKellar*, 4 Ont. R., 407.

The Common Law right as to the priority of an execution creditor of a lunatic, who has an execution in the hands of the Bailiff before the lunatic has been declared such, would not be interfered with by injunction to restrain him from realizing under his writ: *In re Grant*, 28 Grant, 457.

It was held in *Stevenson v. Sexsmith*, 8 P. R., 286, that proving insolvency for a debt not the subject of proof did not estop the party from issuing execution upon it.

As to what amounts to a seizure where goods are in the custody of the law, see *Pardee v. Glana*, 11 Ont. R., 275.

As to the seizure of stock of an incorporated company, see *Brown v. Nelson*, 10 P. R., 421.

As to property liable to seizure, see *The Hamilton Provident & Loan Society v. Gilbert*, 6 Ont. R., 434.

A half interest in a celebrated mare was held the subject of seizure: *Gunn v. Burgess*, 5 Ont. R., 665.

It was also held that the Bills of Sale Act did not apply to the indivisible part of a chattel: *Idem*.

When a party has a *locus standi* so as to set aside an execution, see *Glass v. Cameron*, 9 Ont. R., 712.

As to when an Appeal duly made operates as a supersedeas to an execution and not as a stay thereof merely, see *O'Donohoe v. Robins*, 10 App. R., 622.

In *McCullough v. Sykes*, 11 P. R., 337, it is doubted whether the Statute of Limitations applies to the time for allowing execution to be issued.

In the case of *Girdlestone v. The Brighton Aquarium Company* (*Sinclair's D. C. Act*, 1879, 172-179), as sustained in the Court of Appeal, see 4 Ex. D. at page 107.

The facilitating the recovery of a speedy execution was held to be valid: *Macdonald v. Crombie*, 11 Sup. R., 107.

Under the English Bankruptcy Act a certificate of discharge was by force of that Statute held to be conclusive evidence of the validity of the proceedings under the liquidation, and that the discharge was valid. In such a case execution could not properly issue. It was also held that the plaintiff having received and retained a dividend could not be heard to object to the discharge: *Lewis v. Leonard*, 5 Ex. D., 165. See also *Parke v. Day*, 24 C. P., 619.

The terms "*fiat facias*" and "warrant of execution" used in the Division Courts Act are convertible terms: *Macfie v. Hunter*, 9 P. R., 149.

Where a discharge in insolvency is a complete answer to the issue of an execution, see *Forrester v. Thrasher*, 2 Ont. R., 38; S. C., 9 P. R., 383.

An execution that has expired cannot be renewed: *Sinclair's D. C. Act*, 1886, 118, 119, and note to this Section *ante*.

As to what amounts to a distress for rent, see *Whimsell v. Giffard*, 3 Ont. R., 1.

As to what is a constructive levy, see *Consolidated Bank v. Bickford*, 7 P. R., 172.

An action against a Bailiff where the plaintiff sustains no damage, see *Brown v. Wright*, 35 U. C. R., 378.

As to an action against a Division Court Bailiff for a balance returned on execution, see *Nerlich v. Malloy*, 4 App. R., 430.

The defendant would have a reasonable time in which to pay debt and costs before execution issued against him: *Smith v. Cronk*, 6 P. R., 80, and cases there cited.

It is submitted that a writ of execution is not a Judicial act and that the Court might enquire at what period of the day it was issued: *Clarke v. Bradlaugh*, 8 Q. B. D., 63.

As to what amounts to a seizure of goods by an officer, see *Gibbons v. Farwell*, 34 Alb. L. J., 497, and cases there cited.

As to when moneys may be said to be made or levied under execution, see *Reid v. Gowans*, 13 App. R., 501.

A Bailiff who has taken possession of property under a writ of execution has sufficient special property in them to enable him to maintain trespass and trover: *Krehl v. The Great Central Gas Co.*, L. R. 5 Ex., 289-293, or to insure them against fire, *Drake on Attachment*, 5th Ed., Section 291.

As to what is not the subject of execution, see *Cann v. Thomas*, 17 U. C. R., 1.

Should a mare in foal be seized under execution, the right to the foal would follow the dam: *Rogers v. Highland*, *Iowa Sup. Ct.*, 34 Alb. L. J., 397.

It is submitted that goods sold by a Bailiff under execution may be, by the purchaser, lent to the debtor, and that such act is not a contravention of our Bills of Sale Act, provided it is not done for the purpose of protecting the goods against the creditors of such debtor: *Graham v. Furber*, 14 C. B., 410; *May on Fraudulent Conveyances*, 114; *Woodgate v. Godfrey*, 5 Ex. D. 24; See *Ex parte Cooper. In re Baum*, 10 Ch. D., 313; *Ex parte O'Dell. In re Walden*, 10 Ch. D., 76; *Miller on Bills of Sale*, 114; *Williams v. McDonald*, 7 U. C. R., 381.

It was said by *BURNS, J.*, in *Watts v. Howell*, 21 U. C. R., at p. 259, "Then as to the Division Court Execution, no lien on the debtor's goods exists until the Bailiff actually seizes or does what is equivalent to it."

A Division Court Bailiff may sometimes lose priority by his failure to endorse

on his warrant of execution the time of its receipt by him, so as to make the time clear : *McDougall v. Waddell*, 28 C. P., 191. *Held*, also, that growing crops are seizable under Division Court Execution. *Idem*.

When a person assists a Bailiff on execution, his acts may be considered as those of the Bailiff. *Idem*.

As to what amounts to a seizure, see *Craig v. Craig*, 7 P. R., 206; *Cropper v. Warner*, 1 Cab. & E., 152.

A Bailiff cannot make a valid contract for the sale of goods of a judgment debtor, against whom he held a writ of execution, until he has actually seized the goods : *Ex parte Hall. In re Townsend*, 14 Ch. D., 132; *Samis v. Ireland*, 4 App. R., 141.

As to what are household goods liable to seizure under execution, see 34 Alb. L. J., 106.

Under the Statute which was passed in the year 1886 it was, among other things, provided that a dog should be exempt from seizure under an execution. The writer submits that, independently of that Statute, a dog was not such a chattel as could be seized on execution : *R. v. Robinson*, Bell's C. C., 34; 86 N. Y. R., 365; 79 Ind. R., 9; R. S. C., Chap. 164, s. 9; Browne on Common Words, pages 22 and 152.

As to what are goods, wares and merchandise : *Idem*, 151-156.

As to the exemption of a reaping machine in the possession of a hotel-keeper for distress for rent, see *Mitchell v. Coffee*, 5 App. R., 525.

Unless by Section 7 of this Act (whereby all judgments in Division Courts are declared to have the same force and effect as judgments of Court of Record) it would seem that interest would not be recoverable on any judgment which the party might pay independently of execution. A right to interest on such judgments appears to depend upon the language here used within parenthesis. See *R. v. The County Court Judge of Essex*, 18 Q. B. D., 704.

It will be observed that the Statute (R. S. O., Chap. 143, Sections 27 *et seq.*) respecting Distress for Rent and Taxes, provides that whatever goods are exempt from execution they are to be exempt from distress, and makes further provision in regard to goods which are exempt.

Exemptions.—The following are the Exemption clauses of Chap. 64 of the R. S. O., and have reference to executions from Division Courts as well as other Courts:

EXEMPTION.

[R. S. O., Chap. 64.]

"2. The following chattels are hereby declared exempt from seizure under any writ, in respect of which this Province has legislative authority, issued out of any Court whatever in this Province, namely :

"1. The bed, bedding and bedsteads (including a cradle), in ordinary use by the debtor and his family ;

"2. The necessary and ordinary wearing apparel of the debtor and his family ;

"3. One cooking stove with pipes and furnishings, one other heating stove with pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one coal scuttle, one lamp, one table, six chairs, one washstand with furnishings, six towels, one looking glass, one hair brush, one comb, one bureau, one clothes press, one clock, one carpet, one cupboard, one broom, twelve knives, twelve forks, twelve plates, twelve tea cups, twelve saucers, one sugar basin, one milk jug, one tea pot, twelve spoons, two pails, one wash tub, one scrubbing brush, one blacking brush, one wash board, three smoothing irons, all spinning wheels and weaving looms in

213. (e) If there are cross judgments between the parties, the party only who has obtained judgment for the larger sum shall

Cross judgments may be set off.

domestic use, one sewing machine and attachments in domestic use, thirty volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this subdivision enumerated, not exceeding in value the sum of \$150;

"4. All necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of \$40;

"5. One cow, six sheep, four hogs, and twelve hens, in all not exceeding the value of \$75, and food therefor for thirty days, and one dog;

"6. Tools and implements of or chattels ordinarily used in the debtor's occupation, to the value of \$100;

"7. Bees reared and kept in hives to the extent of fifteen hives. 50 V. c. 10, s. 1.

"3. The debtor may in lieu of tools and implements of or chattels ordinarily used in his occupation referred to in subdivision 6 of section 2 of this Act, elect to receive the proceeds of the sale thereof up to \$100, in which case the officer executing the writ shall pay the net proceeds of such sale if the same shall not exceed \$100, or, if the same shall exceed \$100, shall pay that sum to the debtor in satisfaction of the debtor's right to exemption under said subdivision 6, and the sum to which a debtor shall be entitled hereunder shall be exempt from attachment or seizure at the instance of a creditor. 50 V. c. 10, s. 2.

"4. The chattels so exempt from seizure as against a debtor shall, after his death, be exempt from the claims of creditors of the deceased, and the widow shall be entitled to retain the exempted goods for the benefit of herself and the family of the debtor, or, if there is no widow, the family of the debtor shall be entitled to the exempted goods and the goods so exempt shall not be liable to seizure under attachment against the debtor as an absconding debtor. R. S. O. 1877, c. 66, s. 3.

"5. The debtor, his widow or family, or, in the case of infants, their guardian, may select out of any larger number the several chattels exempt from seizure. R. S. O. 1877, c. 66, s. 4.

"6. Nothing herein contained shall exempt any article enumerated in subdivisions 3, 4, 5, 6 and 7 of section 2 of this Act from seizure in satisfaction of a debt contracted for the identical article. R. S. O. 1877, c. 66, s. 5.

"7. Notwithstanding anything contained in the next preceding five sections, the various goods and chattels which are now liable to seizure in execution for debt shall, as respects debts which have already been or shall be contracted prior to the first day of October, 1887, remain liable to seizure and sale in execution, provided that the writ of execution under which they are seized has endorsed upon it a certificate signed by the Judge of the Court out of which the writ issues, certifying that it is for the recovery of a debt contracted before the date hereinbefore mentioned. 50 V. c. 10, s. 3."

(e) *Sinclair's D. C. Act, 1879, 179.*

In addition to the cases cited at the page above referred to, see *Ex parte Griffin*. *In re Adams*, 14 Ch. D., 37; *Har. C. L. P. Act*, 2nd Ed., 652; *Grant v. McAlpine*, 48 U. C. R., 284; *Brown v. Nelson*, 11 P. R., 131; *Canadian Pacific Ry. Co. v. Grant*, 11 P. R., 208.

have execution, and then only for the balance over the smaller judgment, and satisfaction for the remainder and also satisfaction on the judgment for the smaller sum shall be entered; and if both sums are equal, satisfaction shall be entered upon both judgments. R. S. O. 1877, c. 47, s. 157.

Writs of execution where to be executed.

214. (f) Except in cases brought under section 82 of this Act, no writ in the nature of a writ of execution or attachment shall be executed out of the limits of the county over which the Judge of the Court from which the writ issues has jurisdiction. R. S. O. 1877, c. 47, s. 158.

If party removes to another county, execution obtainable in such county.

215. (g) In case a party against whom a judgment has been entered up removes to another county without satisfying the judgment, the County Judge of the county to which the party has removed may, upon the production of a copy of the judgment duly certified by the Judge of the county in which the judgment has been entered, order an execution for the debt and costs, awarded by the judgment, to issue against such party. R. S. O. 1877, c. 47, s. 159.

The Section does not say upon whose application the set-off of cross judgments may be made. We suggest that it may be made on the application of either party as he may be advised.

(f) Sinclair's D. C. Act, 1879, 179, 180.

It will be seen that in all cases, except those brought under Section 82 of this Act, a writ of execution or attachment shall not be executed by a Bailiff out of the limits of the County for which the Judge of the Court from which the writ issues has jurisdiction. In short, every writ of execution or attachment must be executed within the County from which it issues, except where actions are brought under the 82nd Section—that is, where the sitting of the Court is nearest to the defendant's residence.

(g) Sinclair's D. C. Act, 1879, 180.

As is remarked in the work above referred to, this Section is seldom resorted to. If proceedings are taken under it, the applicant must make sure that not only has he a copy of the judgment but that it is a duly certified copy of the judgment by the proper Judge as well.

216. (h) If the party against whom an execution has been awarded, pays or tenders to the clerk or bailiff of the Division Court out of which the execution issued, before an actual sale of his goods and chattels, such sum of money as aforesaid, or such part thereof as the party in whose favour the execution has been awarded agrees to accept in full of his debt, together with the fees to be levied, the execution shall thereupon be superseded, and the goods be released and restored to such party. R. S. O. 1877, c. 47, s. 160.

Effect of
payment
of execu-
tion be-
fore sale

217. (i) The clerk of a Division Court shall, upon the application of a plaintiff or defendant

Clerk of
any court
in which

(h) Sinclair's D. C. Act, 1879, 180.

The object of this Section is to allow a party to settle the amount of debt and costs before an actual sale of his goods and chattels. He may do so by paying or tendering to the Clerk or Bailiff of the Court out of which the execution issued such sum of money as the judgment or execution if issued may call for, or such sum as the judgment creditor agrees to accept in full of his debt, together with the fees to be levied. When this has been done, he has a right to have his goods released from execution and restored to him.

A defendant having recovered a judgment against the plaintiff in the Division Court at Toronto, a transcript was ordered to be sent to another Division Court at Unionville, but by some mistake in the Division Court office it was not sent until after the debt had been paid, and the Clerk of the Toronto Court endorsed on it a direction to the Clerk of the other Court to issue execution and remit the money to him when made. The plaintiff's goods having been seized under this execution, he sued the defendant for having wrongfully and maliciously and without reasonable or probable cause caused the same to be issued and the plaintiff's goods to be seized thereunder. The defendant had never interfered or given any directions beyond instructing the suit to be brought. *Held*, that the plaintiff could not recover; that it was his duty to protect himself by seeing that the Clerk of the Division Court was notified of payment of the debt, and there was, therefore, no malice or omission on the defendant's part. *Held, also*, that the defendant was not liable in trespass, for he had not authorized the direction by the Clerk to issue execution, which is no part of the Clerk's duty, and that neither could he have been responsible if the attorney had directed it after the suit had been settled: *Tuckett v. Eaton*, 6 Ont. R., 486.

In that case it was said to be a doubtful question whether, under this Section, a person whose goods had been seized under Division Court process could have any further relief than the return of his goods.

(i) Sinclair's D. C. Act, 1879, 180, 181.

Under this Section the Clerk of a Division Court cannot upon his own mere motion prepare and send the transcript which this Section requires. It

judgment
entered
to pre-
pare
transcript
thereof,
to trans-
mit to
any other
Division
Court.

(or his agent), having an unsatisfied judgment in his favour in such court, prepare a transcript of the entry of the judgment, and shall send the same to the clerk of any other Division Court, whether in the same or any other county, with a certificate at the foot thereof signed by the clerk who gives the same, and sealed with the seal of the court of which he is clerk, and addressed to the clerk of the court to whom it is intended to be delivered, and stating the amount unpaid upon the judgment and the date at which the same was recovered; and the clerk to whom the certificate is addressed shall, on the receipt of the transcript and certificate, enter the transcript in a book to be kept in his office for the purpose, and the amount due on the judgment according to the certificate; and all proceedings may be taken for the enforcing and collecting the judgment in such last mentioned Division Court, by the officers thereof, that could be had or taken for the like purpose upon judgments recovered in any Division Court. R. S. O. 1877, c. 47, s. 161.

can only be done upon the application of the plaintiff or the defendant, or the agent of either party, as the case may be. The transcript may shew whether the whole or any part of a judgment remains unsatisfied, and the Clerk shall be bound to send the same to the Clerk of any other Division Court, whether in the same County or in any other County, with a certificate at the end thereof signed by him and sealed with the seal of the Court of which he is Clerk, and addressed to the Clerk of the Court to whom it is intended to be delivered. Such transcript shall state the amount unpaid upon the judgment, and the date on which the same was recovered. The Clerk of the Court to whom the certificate is addressed shall, on receipt of the same, enter it in a book to be kept in his office for that purpose, and the amount which appears to be due on the judgment as appears by the certificate.

All proceedings may be taken in the Court to which the cause is transferred by the party on whose behalf such transcript is issued for enforcing and collecting the judgment thereupon as if such judgment had been originally recovered in such Court.

Some doubt has hitherto existed as to whether, after the entry of such transcript, it may be called a judgment of the Court to which such transcript

218. (j) The clerk of every Division Court shall, immediately after *nulla bona* has been returned to an execution issued on a transcript of judgment received from another court, forward through the post office to the plaintiff, if his address is known, or to the clerk who issued the transcript, at his post office address, a notice, enclosed in an envelope, informing him of the date at which the execution issued, the date at which the same was returned by the bailiff, and the return made thereto; the notice thus sent shall be prepaid and registered, and the clerk shall obtain and file among the papers in the action the post office certificate of the registration, and the postage and charge for registration shall be costs in the cause: the absence from amongst the papers in the action of the certificate of registration shall be *prima facie* evidence against the clerk that the notice has not been forwarded. 45 V. c. 7, s. 6.

Clerk to give notice to plaintiff of return of *nulla bona* in case of execution on a transcript of judgment.

219. (k) In case of the death of either or both of the parties to a judgment in a Division Court, the party in whose favour the judgment has been entered, or his personal representative in case of his death, may revive the judgment against the other party, or his personal representative in case of his death, and

Revival of judgment in case of death of party to judgment.

is sent. It will be observed that the words of the Statute leave no doubt upon that subject, because it says: "All proceedings may be taken for the *enforcing and collecting the judgment* in such last mentioned Division Court by the officers thereof." All affidavits to be made in the Court to which the transcript is so sent and entered should be entitled in such last mentioned Court.

(j) Sinclair's D. C. Law, 1884, 83, 85.

The writer has fully expressed his views upon this Section at the pages above referred to.

(k) Sinclair's D. C. Act, 1879, 181.

Under this Section, the party who seeks to revive the judgment or against whom it is sought to revive the same must be duly appointed the personal

may issue execution thereon in conformity with any rules which apply to the Division Court in that behalf. R. S. O. 1877, c. 47, s. 162.

Execu-
tion,
when
dated
and
return-
able.

220. (l) Every execution shall be dated on the day of its issue, and shall be returnable within thirty days from the date thereof, but may, from time to time, be renewed by the clerk, at the instance of the execution creditor, for six months from the date of such renewal, in the same manner and with the same effect as like writs from the Courts of Record may be renewed under the provisions of *The Execution Act*. R. S. O. 1877, c. 47, s. 163; 43 V. c. 8, s. 64.

Rev. Stat.
c. 64.

Renewal
of execu-
tion by
county
attorney
in certain
cases.

221. (m) Where the books, papers and other matters in the possession of any clerk, by virtue of or appertaining to his office, become the property of the County Crown Attorney, under section 50 of this Act, or in case of the suspension of a clerk, the County Crown Attorney may, during such suspension, or until the appointment and qualification of

representative before a proceeding can be taken. See pages 275, 294, 295, 305, 328, of the above work, and 23 L. J. N. S., 358.

(l) *Sinclair's D. C. Act*, 1879, 182; *Sinclair's D. C. Act*, 1880, 98.

Since 1879 the only change which has been effected under this Section in regard to the renewal of executions is, that an execution is now renewed for six months instead of thirty days from the date of such renewal. Were the words "from time to time" not inserted in this Section the execution could only be renewed once: *Neilson v. Jarvis*, 13 C. P., 176.

An execution that has expired cannot be renewed: *Sinclair's D. C. Law*, 1884, 97; *Sinclair's D. C. Act*, 1886, 119; *Macdonald v. Crombie*, 11 Sup. R., 109; *Barker v. Palmer*, 8 Q. B. D., 9; *Doyle v. Kaufman*, 3 Q. B. D., 7; *Neilson v. Jarvis*, 13 C. P., 182, 183; *Price v. Thomas*, 11 C. B., 543; *Lowson v. Canada Farmer's Mutual Ins. Co.*, 9 P. R., 309; *Cole v. Sherard*, 11 Ex., 482; *Smalpage v. Tonge*, 17 Q. B. D., 644.

(m) *Sinclair's D. C. Act*, 1880, 89, 90.

This Section makes provision for two cases: First, where the books, papers and other matters become the property of the County Attorney under Section 50 of this Act; second, in the event of the suspension of the Clerk, the County Attorney may in either case renew any writ of execution issued out of the

another clerk, when the same shall be presented for that purpose, renew any writ of execution issued out of such court, which may lawfully be renewed, and the renewal shall have the same force and effect as if the same had been renewed by a clerk of the court, and he shall be entitled to the same fees therefor as a clerk for like services. 43 V. c. 8, s. 57.

222. (n) In case the Judge is satisfied upon application on oath made to him by the party in whose favour a judgment has been given, or is satisfied by other testimony that such party will be in danger of losing the amount of the judgment, if compelled to wait till the day appointed for the payment thereof before any execution can issue, the Judge may order an execution to issue at such time as he thinks fit. R. S. O. 1877, c. 47, s. 164.

Judge
may
order an
execution
to issue
before
regular
day.

223. (o) In case an execution is returned *nulla bona*, and the sum remaining unsatisfied

If execu-
tion re-
turned

Court. He can only do so where such writ could lawfully be renewed—that is, at the instance of the party in whose behalf it was issued and in force under Section 220. On such renewal the writ is declared to have the same force and effect as if such had been done by the Clerk of the Court, and the County Attorney is entitled to the same fees as the Clerk would have been for such service.

(n) Sinclair's D. C. Act, 1879, 182, 183.

The application must be made to the Judge, and it had better be so made upon affidavit in due form to be filed in the Court. Such affidavit must be made by the party in whose favor such judgment has been given. It could not be made by any other. Should such affidavit not be obtainable, the Judge could satisfy himself by other testimony (by which is meant either affidavit or oral testimony) that the party would be in danger of losing the amount of the judgment if compelled to wait until the day appointed for payment thereof, before any execution could issue, and might order an execution to issue forthwith or at such time as he thinks fit.

From the context of this Section, and the object it has in view, we are of opinion that the application could be made *ex parte*.

(o) Sinclair's D. C. Act, 1879, 183, 184.

The writer has pretty fully expressed his views in the pages of the work above referred to. In addition to the authorities cited in note (m) at page 184, the writer has to refer to the additional case of *Burgess v. Tully*, 24 C. P., 549.

*nulla
bona, par-
ties may
obtain
trans-
cript.*

on the judgment under which the execution issued amounts to the sum of \$40, the plaintiff or defendant may obtain a transcript of the judgment from the clerk, under his hand and sealed with the seal of the court, which transcript shall set forth,

1. The proceedings in the cause ;
2. The date of issuing execution against goods and chattels ; and
3. The bailiff's return of *nulla bona* thereon, as to the whole or a part. R. S. O. 1877, c. 47, s. 165.

Upon
filing
transcript
in office
of County
Court
Clerk,
judgment
to be
judgment
of that
Court.

224. (*p*) Upon filing the transcript in the office of the clerk of the County Court, in the county where the judgment has been obtained, or in the county wherein the defendant's or plaintiff's lands are situate, the same shall become a judgment of the County Court, and the clerk of the County Court shall file the transcript on the day he receives the same, and enter a memorandum thereof in a book to be by him provided for that purpose, which memorandum shall contain,

1. The names of the plaintiff and defendant ;
2. The amount of the judgment ;
3. The amount remaining unsatisfied thereon ; and

In the case of *Bridge v. Branch*, 1 C. P. D., 633, it was held under a somewhat similar Statute that it was competent to the Court to which such judgment was removed to set it aside, if satisfied that it was obtained in a matter over which the inferior Court had no jurisdiction.

It is very important for a plaintiff or defendant to observe carefully the provisions of this Section. The cases referred to in note (*m*) above cited shew that if any defect or omission appears in the necessary statement of proceedings in the cause, the whole judgment will be thereby invalidated.

(*p*) Sinclair's D. C. Act, 1879, 184, 185.

Little can be added by the writer to the views expressed at these pages.

See *Burgess v. Tully*, 24 C. P., 549 ; *Bridge v. Branch*, 1 C. P. D., 633 ; *Samis v. Ireland*, 4 App. R., 118, 140.

4. The date of filing ;

for which services the clerk of the County Court shall be entitled to demand and receive from the person filing the same the sum of fifty cents. R. S. O. 1877, c. 47, s. 166.

225. (q) Such book shall at all reasonable hours be accessible to any person desirous of examining the same, upon the payment to the clerk of ten cents. R. S. O. 1877, c. 47, s. 167.

County Court Clerk's book to be accessible.

226. (r) Upon such filing and entry the plaintiff or defendant may, until the judgment has been fully paid and satisfied, pursue the same remedy for the recovery thereof or of the balance due thereon, as if the judgment had been originally obtained in the County Court. R. S. O. 1877, c. 47, s. 168.

Parties may prosecute judgment in County Court.

227. (s) On any writ of execution against goods and chattels, the sheriff or other officer to whom the same is directed may seize and sell the interest or equity of redemption in any goods or chattels of the party against whom the writ has issued, and the sale shall

The interest of a mortgagor in goods mortgaged may be sold in execution.

(q) Sinclair's D. C. Act, 1879, 185.

The Clerk of the County Court would be bound, upon the payment or tender of the fee here expressed, to allow the entry in such book to be examined by any person desirous of so doing, and his refusal to do so would subject him to *mandamus* or to indictment for malfeasance in office. See also *McNamara v. McLay*, 8 App. R., 319.

(r) Sinclair's D. C. Act, 1879, 185.

In addition to the authorities cited at the above page, reference may be made to the case of *Samis v. Ireland*, 4 App. R., 118, in which it was held that if the proceedings in the Division Court shew that no proper judgment could have been recovered in that Court, such so-called judgment is void : *per* *Meas. C. J.*, at p. 121. See the note to Section 224.

(s) Sinclair's D. C. Act, 1879, 185, 186.

As to what may be seized by a Bailiff or officer under an execution from the Division Court, the reader is referred to the notes to Section 212 *h supra*, and to the pages of the work above referred to.

It must be borne in mind that an indivisible interest in a chattel may be seized and sold under this Section, and that such interest is not subject to the

convey whatever interest the mortgagor had in the goods and chattels at the time of the seizure. R. S. O. 1877, c. 47, s. 169.

What
may be
seized
under ex-
ecution
against
goods and
chattels.

228. (t) Every bailiff or officer having an execution against the goods and chattels of any person, may by virtue thereof seize and take any of the goods and chattels of such person (except those which are by law exempt from seizure), and may also seize and take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties or securities for money belonging to such person. R. S. O. 1877, c. 47, s. 170.

Bailiff
to hold
cheques,

229. (u) The bailiff shall for the benefit of plaintiff, hold any cheques, bills of exchange,

Bills of Sale Act (R. S. O., 1207-1215), such Act being intended to apply only to the entire interest in a chattel. See *Gunn v. Burgess*, 5 Ont. R., 685.

On sale of the interest or equity of redemption in any goods or chattels under this Section, the weight of opinion seems to be that the Bailiff can only sell so as to give his vendee a right to stand in the position of the mortgagor only, and that he cannot sell the goods themselves and transfer the possession to the purchaser: *Squair v. Fortune*, 18 U. C. R., 547.

(t) *Sinclair's D. C. Act*, 1879, 186.

A Bailiff would be a trespasser who seized and took any of the goods and chattels of the person against whom he has an execution which were by law exempt from seizure.

As to what are exempt, the reader is referred to the Exemption Act (R. S. O., Chap. 64), quoted at page 230.

At Common Law, bank notes or securities mentioned in this Section were not the subject of seizure; they are here made so for Division Court purposes.

As to the manner of a Bailiff's executing an execution, see 6 *Mews' Digest* 1124-1150, and notes to Section 212; *McMaster v. Meakin*, 7 P. R., 211; R. & J., 3525-3566, 4710; Ont. Digest, 1884, 732; Ont. Digest, 1887, 636; 3 *Mews' Digest*, 1537-1550; *Watson on Sheriff*, 242-304; *Churchill on Sheriff*, 2nd Ed.

As to landlord's claim for rent, see 3 *Mews' Digest*, 1551-1558; *Sinclair's D. C. Act*, 1879, 213-229.

If a married woman has separate property settled to her separate use, with restraint upon anticipation, it is difficult to see how a creditor can get at it by any process of law: *Stanley v. Stanley*, 7 Ch. D., 589.

(u) *Sinclair's D. C. Act*, 1879, 187.

The writer has substantially expressed his views upon this Section at the page of the work above referred to.

promissory notes, bonds, specialties, or other securities for money so seized or taken as aforesaid, as security for the amount directed to be levied by the execution, or so much thereof as has not been otherwise levied or raised, and the plaintiff, when the time of payment thereof has arrived, may sue in the name of the defendant, or in the name of any person in whose name the defendant might have sued, for the recovery of the sum or sums secured or made payable thereby. R. S. O. 1877, c. 47, s. 171.

notes, etc.
seized
under ex-
ecution
for bene-
fit of
plaintiff.

230. (v) The defendant in the original cause shall not discharge such action in any way without the consent of the plaintiff or of the Judge. R. S. O. 1877, c. 47, s. 172.

Defend-
ant in
original
cause not
to dis-
charge
action.

231. (w) The party who desires to enforce payment of a security seized or taken as aforesaid, shall first pay or secure all costs that may attend the proceeding; and the moneys realized, or a sufficient part thereof, shall be paid

The party
wishing
to enforce
must
secure
costs.

The "plaintiff" here mentioned means the execution creditor. Should the defendant be such, it is submitted that according to the ordinary rules of Statutory construction, and the Ontario Interpretation Act, the word "defendant" could be read for the word "plaintiff" if necessary. See the notes to Section 228.

(v) Sinclair's D. C. Act, 1879, 187, 188.

This Section preserves to the execution creditor the benefit of the seizure by preventing the discharge of such action which might in any way be obtained without his consent or of the Judge. His rights shall, therefore, stand as they existed at the time of the seizure, and no act of the execution debtor shall in any way prejudice them.

It is submitted that the execution creditor will be in much the same position as an assignee of a chose in action would be in after he had given notice to the debtor of the assignment to him: See Kehoe on Choses in Action; Shirley's Leading Cas., 3rd Ed., 225-228.

(w) Sinclair's D. C. Act, 1879, 188.

With reference to the page just referred to, this Section is merely declaratory of the law: De Colyar on Guarantees, 2nd Ed., 48.

If more is realized than sufficient to pay the execution debt, the overplus, if any, must be forthwith paid to the defendant in the original action under the direction of the Judge; his order must first be obtained.

over by the officer receiving the same to apply on the plaintiff's demand, and the overplus, if any, shall be forthwith paid to the defendant in the original action, under the direction of the Judge. R. S. O. 1877, c. 47, s. 173.

232. (x) The bailiff, after seizing goods and chattels by virtue of an execution, shall indorse on the execution the date of the seizure, and shall immediately, and at least eight days before the time appointed for the sale, give public notice by advertisement signed by himself, and put up at three of the most public places in the division where the goods and chattels have been taken, of the time and place within the division when and where they will be exposed to sale; and the notice shall describe the goods and chattels taken. R. S. O. 1877, c. 47, s. 174.

If the party for whose benefit a "security" has been seized or taken as aforesaid desires to enforce payment of the same, he shall first pay or secure all costs that may attend the proceeding. He may sue upon it under Section 229 in the name of the defendant or other person entitled to do so.

(x) Sinclair's D. C. Act, 1879, 188.

This Section declares that the Bailiff after seizing goods and chattels by virtue of his execution, shall endorse on the same the date of the seizure.

As to what is a "seizure," see notes to Section 212 hereto. Also *Hincks v. Sowerby*, 4 App. R., 113; *Whimsell v. Giffard*, 3 Ont. R., 1, and cases there cited; *Gladstone v. Padwick*, L. R., 6 Ex., 203.

The Bailiff should then endorse on the execution the date of the seizure. To protect the goods against other claims, we would advise not only that the day of the month but the hour of the day should be endorsed on the execution. He is bound *immediately* to give public notice by advertisement in the manner prescribed by this Section of the time and place when and where they will be exposed to sale.

As we have already referred in the notes to Section 212, if there has been no valid seizure there can be no proper sale.

The public notice which this Section requires must be given eight days "at least" before the time appointed for the sale. This means eight *clear* days, the day of putting up the advertisement and the day of sale being excluded.

As remarked at page 188 of Sinclair's D. C. Act, 1879, any irregularity in the publication of the notice, or even in the absence of notice, would not invalidate the sale otherwise honestly conducted.

The notice must be signed by the Bailiff. Probably his signature in print

233. (y) The goods so taken shall not be sold until the expiration of eight days at least next after the seizure thereof, unless upon the request in writing under the hand of the party whose goods have been seized. R. S. O. 1877, c. 47, s. 175.

Goods not to be sold till eight days after seizure.

234. (z) No clerk, bailiff or other officer of a Division Court shall, directly or indirectly, purchase any goods or chattels at any sale made by any Division Court bailiff under execution, and every such purchase shall be absolutely void. R. S. O. 1877, c. 47, s. 176. *See also* c. 16, s. 27.

Bailiff and other officers not to purchase goods seized

would be sufficient, but, to save questions, it would be better to be under his own signature.

The notice should particularly describe the goods and chattels seized, taken and exposed for sale.

(y) Sinclair's D. C. Act, 1879, 188, 189.

A sale cannot properly take place until after the expiration of eight days at least next after the seizure, unless at the request in writing under the hand of the party whose goods have been seized. We think the Bailiff might waive the necessity for the request being in writing and take consent orally. The Bailiff, however, should for his own protection observe the Statute and take the request in writing under the hand of the party.

As will be seen at the pages referred to of the above work, a sale had before the expiration of the eight days would not be void. It would be irregular only, and, if the debtor suffered any damage in consequence, the Bailiff and probably his sureties, too, would be responsible for it on their Covenant: 6 Mews' Digest, 1140.

The Bailiff should stop the sale as soon as sufficient money is raised: Cook v. Palmer, 6 B. & C., 739.

The sale is for ready money and immediate delivery, and the Bailiff is not justified, after he has sold as much as will apparently satisfy the execution, in selling more, on the speculation that the actual delivery of the goods sold may be prevented by loss or accident: Aldred v. Constable, 6 Q. B., 370.

The goods must be sold within a reasonable time: Bales v. Wingfield, 2 N. & M., 831; Jacobs v. Humphrey, 4 Tyr., 272. See also the above pages of the writer's work of 1879, and the notes to Section 228 hereto.

(z) Sinclair's D. C. Act, 1879, 189.

This Section is only declaratory of the Common Law. No person who has, as a public officer, the sale of any goods or chattels could either directly or indirectly be the purchaser thereof. The Bailiff is in the nature of a trustee and it would never do to allow selfish interests to conflict with public duty.

EXAMINATION OF JUDGMENT DEBTORS.

Judgment debtors may be examined at the instance of their creditors.

235. (a) A party having an unsatisfied judgment or order in a Division Court, for the payment of any debt, damages or costs, may procure from the court wherein the judgment has been obtained, if the defendant resides or carries on his business within the county in which the division is situate, or from any Division Court into which the judgment has been removed under section 217 of this Act and within the limits of which Division Court the defendant resides or carries on his business, a summons in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, and the summons may be served either personally upon the person to whom the same is directed, or by leaving a copy thereof at the house of the party to be served or at his usual or last place of abode, or with some grown person there dwelling, requiring him to appear at a time and place therein expressed, to answer such things as are therein named, and if the defend-

(a) Sinclair's D. C. Act, 1879, 189-191; D. C. Act, 1880, 91, 92; D. C. Law, 1884, 82.

In addition to the authorities cited at the pages just adverted to, reference may be made to the following cases:

At page 76 of Sinclair's D. C. Law, 1885, the writer there expresses the opinion that a married woman was liable to judgment summons and its consequences as any other defendant. It is true that up to that time the decided cases favored that view. It cannot be said now that the later authorities sustain that opinion. Indeed they do not, and the language and reasoning on that subject are so clear that we cannot do better than repeat the words of the Judges: In *Scott v. Morley*, 20 Q. E. D., 120, the Court of Appeal in England had to consider whether a married woman was liable to commitment under Section 5 of the English Debtor's Act of 1869, (32 and 33 Victoria, Chapter 62.) It is in these words: "Subject to the provisions herein after mentioned, and to the prescribed rules, any Court may commit to prison, for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent Court." The married woman in this case had been sued in con-

ant appears in pursuance thereof, he may be examined upon oath touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability, which formed the subject of the action and as to the means and expectation he then had, and as to the property and means he still has of discharging the debt, damages or liability, and as to the disposal he has made of any property: Provided, nevertheless, that before the summons shall issue, the plaintiff, his solicitor or agent, shall make and file with the clerk of the court from which the summons may issue an affidavit stating,

Affidavit
required
before
judgment
summons.

1. That the judgment remains unsatisfied in the whole or in part;

2. That the deponent believes that the defendant sought to be examined is able to pay the amount due in respect of the judgment or some part thereof; or,

3. That the defendant sought to be examined has rendered himself liable to be committed to gaol under this Act. R. S. O. 1877, c. 47, s. 177; 43 V. c. 8, s. 59; 45 V. c. 7, s. 5.

junction with her husband, by a creditor of the wife, in respect of a debt contracted by her while she was a married woman. The writ was not served on the husband. The wife appeared to the writ, and an order was made in Chambers giving the plaintiff leave to sign judgment for the amount indorsed on the writ, with interest and costs, unless the amount of the plaintiff's claim should be paid into Court on or before a certain time, or security given within that time. The order directed that execution should be limited to the separate estate of the wife, not subject to any restraint on anticipation, unless by reason of Section 19 of the Married Women's Property Act, 1882, (Section 2, subsection (2) of our Act), such estate should be liable to execution, notwithstanding such restraint.

The wife did not, within the time limited, either pay the amount into Court or give security for the same, and the plaintiff signed judgment against the defendant—the married woman—for debt and costs, amounting in the whole to nearly £300, sterling.

Upon these facts and such judgment, an order was applied for and obtained, that she should be committed to prison for six weeks for non-payment of the money.

Against this order she appealed, contending that the Statute had no application to the case of a married woman, and that she could not be committed to gaol in the same way as a man could for debt contracted by him. On the other hand, it was urged, against the married woman, that the liability was a personal one although execution was limited to her separate property.

As the matter is of some moment, we venture to give the views of the Judges upon it at greater length than usual, the better to explain the principle of law on which the decision is founded.

Lord Esher, Master of the Rolls, says :

" I will consider first what was the liability of a married woman before and up to the coming into operation of the Married Women's Property Act, 1882. At Common Law as regarded a contract made by a woman before her marriage, but which was not sued upon till after her marriage, she and her husband were sued together, and, if it was proved that the contract on which the action was brought had been made by the wife before marriage, the judgment went against both husband and wife, and the execution followed the judgment. In those days one mode of execution was by a *capias ad satisfaciendum*, and the writ went against both husband and wife, so that the wife could be taken in execution to satisfy the judgment. Under certain circumstances—if it was proved that the wife had no separate property—the Court was enabled to deal with a wife in a different way from that in which they dealt with the husband; the Court could not deal with him at all. But the wife was liable to be taken under a *capias* in respect of a contract entered into by her before marriage. During marriage a woman could not legally enter into any contract without the authority of her husband, and no action could be maintained upon such a contract against her and her husband. If during marriage she entered into a contract without the authority of her husband there was no remedy in respect of it; if she entered into a contract with his authority it was his contract alone, and he alone could be sued upon it. Again, if a wife during marriage committed certain torts, she could be sued in respect of them jointly with her husband; she could be sued on the ground that she had committed the wrong, and he on the ground that he had permitted her to do so. But the judgment went against both husband and wife, and, as the execution followed the judgment, the wife could be taken under a *capias*. But at Common Law, in respect of a contract made by a woman during marriage, there was no remedy; in other words, there was no legal liability upon her. In Equity, however, a decree could be obtained upon such a contract, but only when the woman had separate property, and the decree was in the form of a declaration that her separate estate was chargeable with the amount due on the contract. That is to say, in Equity the creditor could obtain an order charging the woman's separate estate, but the order did not render her liable to be taken in execution. Therefore, up to the time of the coming into operation of the Married Women's Property Act, 1882, a married woman could be taken in execution upon a judgment recovered after her marriage against her and her husband in respect of a contract made by her before marriage, and also upon a judgment recovered against her and her husband in respect of a wrongful act done by her during the marriage. But neither at Law nor in Equity was she liable to be taken in respect of a contract made by her during marriage. It seems to me that the Act of 1882 does not alter the legal liability of a married woman at all. It does not prevent the bringing of an action against a husband and wife in respect of a contract made by the wife before marriage, and it does not affect the case of a wrongful act committed by a woman during marriage, and, where at Common Law a married woman was liable to be taken under a *capias ad satisfaciendum*, in such cases she can now be summoned under s. 5 of the Debtors' Act, 1869, and be dealt with accordingly.

" But then arises the question, what is now the position of a married woman

in respect of a liability to which she was not subject at Common Law, but which has been imposed on her solely by the Married Women's Property Act, 1882? The liability is imposed by sub-s. 2 of s. 1 of that Act, which provides that 'a married woman shall be capable of entering into and rendering herself liable on any contract.'

"That must mean that a woman shall after she is, and whilst she is married, be capable of entering into and rendering herself liable upon any contract. She could enter into a contract before the Act, and therefore the Act must mean that she shall be capable of entering into a contract so as to render herself liable upon it. A liability is thus imposed on her which did not exist either at Law or in Equity before the Act. If sub-s. 2 had stopped there, I should have thought that the same consequences would follow as in the case of a contract entered into by a *feme sole*. If no remedy were given by the Act for a breach of the contract, the remedy must be that Common Law remedy which is applicable to the case. But, if a remedy is given by the Statute which imposes the new liability, that must be the only remedy. Sub-s. 2 goes on to provide that the woman shall be capable of rendering herself liable 'in respect of and to the extent of her separate property,' and 'of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*,' and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her, (that again alters the law); 'and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.'

"That is, the damages recovered are not to be payable by the married woman; they are to be payable out of her separate property. It seems to me that the judgment in such an action ought to follow the words of the Act. The damages to be recovered are to be payable out of the woman's separate property, or they are to be recovered against her, but are to be payable only out of her separate property. This Section really imposes a new liability on a married woman at Law, which will produce the same result as was before the Act produced in Equity. In Equity the decree was that the sum found due should be charged on the married woman's separate estate, and the same effect is, as it seems to me, given by the Act to an action at Law as was before the Act produced in Equity by a different process.

"If this be so, does s. 5 of the Debtors' Act, 1869, apply to a judgment of this nature? Sect. 5 says that the Court may commit to prison any person who makes default in payment of 'any debt due from him' in pursuance of any order or judgment of the Court. What is the real meaning of those words 'due from him'? It appears to me that they point to a debt which the defendant is personally liable to pay. If you treat the Debtors' Act as an Act which authorizes the Court to commit people to prison, then you must construe it strictly. It is a highly penal Act, affecting the liberty of the subject, and you must not say that a sum which is payable only out of a person's property is a sum 'due from' that person. If, on the other hand, you treat the Act as a remedial Act, then it only enables the Court to modify the imprisonment which could have been inflicted at Common Law, so as to prevent it from being so large as it was at Law before the Act; and, treating the Act in that way, s. 5 cannot apply to such a case, because there was nothing to modify, there being no power to arrest a married woman before the Act. If it is treated as a penal Act it must not be stretched. In either view of the Act, it appears to me that s. 5 of the Debtors' Act does not apply to the judgment which can be recovered against a married woman only by virtue of the Married Women's Property Act, 1882. On these grounds I agree with the decision in *Draycott v. Harrison*, 17 Q. B. D., 147, though not with all the reasons given by the learned Judges.

"I desire to repeat that our present decision applies merely to judgments

which can be recovered against a married woman only by virtue of the Act of 1882, and that it does not apply to judgments which could have been recovered against a married woman at Common Law before that Act.

"The order of *KEKEWICH, J.*, was wrong, and it must be discharged. But it appears that the question of jurisdiction was not argued before him."

BOWEN, L. J. and FRY, L. J., in somewhat full judgments, arrive at the same conclusion: See also *Palliser v. Gurney*, 19 Q. B. D., 519; *In re Gardiner. Ex parte Coulson*, 20 Q. B. D., 249.

The remarks which the Judges above have made do not apply to any Common Law remedy against the married woman, but only to her liability under the Married Women's Property Act. For Form of judgment against a married woman, see 20 Q. B. D., 132.

It was held in the case of *Imperial Bank v. Dickey*, 8 P. R., 246, that in serving a defendant with an order to examine him as a judgment debtor, it was not necessary to exhibit the original order unless demanded. It will be observed that in order to take ulterior proceedings under this Section against the defendant, personal service of the judgment summons is not absolutely necessary. If practicable it had better be made.

It would appear to be allowable for a creditor to issue execution against his debtor pending a judgment summons: *Hayter v. Beall*, 44 L. T. N. S., 131.

A defendant under judgment summons is bound virtually to give a full exposition of his affairs: *Republic of Costa Rica v. Strousberg*, 16 Ch. D., 8.

It is submitted that the examination of the judgment debtor is not restricted to the period of contracting the debt, but that it may be shewn at some anterior time, no matter how far back the debtor had property, as to which he may be required to give an account: *The Ontario Bank v. Mitchell*, 32 C. P., 73.

The property of a debtor's wife settled to her use is not "means he still has" within the meaning of this Section: *Chard v. Jervis*, 9 Q. B. D., 178. See 18 L. J. N. S., 390.

A judgment debtor under twenty-one years of age would also be subject to this Section. If he had not defended on the ground of infancy he would stand in the same position as any other debtor.

It is important to consider the condition on which the summons can issue under this Section. An affidavit must be made and filed as required by this Section: See *Sinclair's D. C. Act, 1880*, 91; *Martin qui tam v. Consolidated Bank*, 45 U. C. R., 163; *Moses v. Richardson*, 8 B. & C., 421; 12 Sim., 90.

It must be made by one of the three parties mentioned in the proviso to this Section. Should the defendant appear and submit to examination, he would thereby waive the making or filing of this affidavit, and an order could be made against him just in the same way as if the affidavit had been properly made and filed: See *R. v. Hughes*, 4 Q. B. D., 614.

A Form of this affidavit will be found at page 92, *Sinclair's D. C. Act, 1880*.

It is doubtful if Prohibition would go on a defective affidavit: *In re Sato v. Hubbard*, 8 P. R., 445.

A creditor should see that all the prerequisites of the defendant's examination exist before he takes this proceeding. If taken wantonly and without just cause, probably the Judge would make the party obtaining the judgment summons pay the expenses of it; otherwise the costs would, under Section 238, be costs in the cause.

The summons may be served at the defendant's "house or at his usual or last place of abode, or with some grown person there dwelling." As to the meaning of the word "dwelling-house," see 34 Alb. L. J., 284.

236. (b) The person obtaining the summons and all witnesses whom the Judge thinks requisite, may be examined upon oath, touching the inquiries authorized to be made as aforesaid. R. S. O. 1877, c. 47, s. 178.

Examination of witnesses.

237. (c) The examination shall be held in the Judge's chamber, unless the Judge otherwise directs. R. S. O. 1877, c. 47, s. 179.

The examination to be in Judge's chamber.

It is almost needless to say that there cannot be any examination of the debtor himself or any witnesses under Section 236 if he does not appear.

In the case of *Stonor v. Fowle*, in the House of Lords, reported in appeal at page 173 of 84 *Law Times Journal*, in speaking of a party's getting time to pay and submitting to an order for commitment in default, Lord BRAMWELL says:

"There is one observation which I should like to make, partly owing to what was said by the learned counsel who followed Sir Henry James. No doubt the County Court Judges have to do their business in a considerable hurry, and especially such business as this, as I can pretty well testify from my own experience of these things. They cannot give them that elaborate discussion which is perhaps desirable. *But I think that a County Court Judge would do wrong if, merely because both parties were willing to give time, as was done here, he should adjudicate that the man had means and had made default. I think that that would be wrong. At the same time, if the whole conduct of the parties before him was such as to recognise that the man had had means, the County Court Judge might well adjudicate without any specific proof of it. I think it is important to bear in mind that an adjudication of committal ought clearly only to take place where there has been a wilful default in payment; because in truth this power of committal is not an imprisonment for debt; it is an imprisonment for past dishonesty, together with the prospect of the plaintiff getting his money.*"

The last case is reported in 18 Q. B. D., 213, under the name of *R. v. The Judge of Brompton. C. C.*, where it was held that there cannot be a conditional order against a debtor for him to pay by instalments and on default to be committed for a specified time. The case was reversed under the name of *Stonor v. Fowle*; *Supra*.

The doctrine of a conditional order being bad was sustained, but it was held that the order was really not conditional; that a memorandum made by the Registrar of the Court could not make it so.

(b) *Sinclair's D. C. Act, 1879, 191.*

The person obtaining the summons may summon and examine all witnesses whom the Judge thinks requisite. This is in addition to the examination of the party. All and every subject mentioned in the next previous Section upon which the debtor can be examined, so also can any witnesses be examined that the creditor may choose to call.

(c) *Sinclair's D. C. Act, 1879, 191.*

We can add nothing to what has been said on the above page.

Costs.

238. (d) The costs of the summons and of all proceedings thereon shall be deemed costs in the cause, unless the Judge otherwise directs. R. S. O. 1877, c. 47, s. 180.

Party examined and discharged not to be again summoned.

Exception.

239. (e) In case a party has, after his examination, been discharged by the Judge, no further summons shall issue out of the same Division Court at the suit of the same or any other creditor, without an affidavit satisfying the Judge upon facts not before the court upon the examination, that the party had not then made a full disclosure of his estate, effects and debts, or an affidavit satisfying the Judge that since the examination the party has acquired the means of paying. R. S. O. 1877, c. 47, s. 181.

Consequence of neglect or refusal to attend.

240. (f) If the party so summoned—

1. Does not attend as required by the sum-

(d) *Sinclair's D. C. Act, 1879, 191.*

Should the plaintiff wilfully or maliciously, without having reasonable or probable cause for making the affidavit for examination of the defendant, take proceedings under Section 235, it is submitted that the Judge should shew his disapprobation of such conduct by denying to him the costs of the examination, summons and subsequent proceedings. Great indifference is frequently shewn by parties in making the affidavit for examination, and there are cases in which the Judge should shew his disapprobation of such conduct not only by withholding costs but by imposing such as are chargeable against the creditor as well.

(e) *Sinclair's D. C. Act, 1879, 191, 192.*

We have to add little to what has been said at the pages just cited. Should a defendant be discharged and his creditor be desirous of again examining him he would have to satisfy the Judge—first that the party had not upon his examination made a full disclosure of his estate, effects and debts, or that since such examination he has acquired the means of paying the judgment debt.

What might be considered a full "disclosure" might be a matter of some doubt. It could hardly be said that a debtor should voluntarily make such disclosure as this Section contemplates, but it would appear to the writer that if he made such full disclosure concerning matters upon which the plaintiff thought proper to examine him it would be a compliance with this Section. If a plaintiff should adopt the latter alternative of the Section, the affidavit should clearly shew what means, if any, the defendant has acquired of paying the debt since the examination.

(f) *Sinclair's D. C. Act, 1879, 192, 193 : Imperial Act, 32-33 Vic., Chap. 62, Sec. 5, sub-sec. 2.*

mons, or allege a sufficient reason for not attending; or

2. If he attends and refuses to be sworn or to declare any of the things aforesaid; or

3. If he does not make answer touching the same to the satisfaction of the Judge; or

4. If it appears to the Judge, either by the examination of the party or by other evidence, that the party,

(a) Obtained credit from the plaintiff or incurred the debt or liability under false pretences, or by means of fraud or breach of trust; or

(b) Wilfully contracted the debt or liability without having had at the time a reasonable expectation of being able to pay or discharge the same; or

(c) Has made or caused to be made any gift, delivery or transfer of any property, or has removed or concealed the same with intent to defraud his creditors or any of them; or

5. If it appears to the satisfaction of the

In *Crooks v. Stroud*, 10 P. R., 131, it was held that a satisfactory answer upon an examination as a judgment debtor, according to the then Statute (R. S. O., Chap. 50, Sec. 305), meant more than that the answer should be a full, proper and pertinent answer to the question. It seems that the answer should shew a satisfactory disposition of the property, and that the illegal and wrongful disposition of his money by gambling, horse-races, or otherwise, should be disclosed, and would be unsatisfactory. But see *McInnes v. Hardy*, 7 U. C. L. J., 295.

As to what is pecuniary ability, see 34 Alb. L. J., 284.

Where a plaintiff had compounded with a debtor, it was held that the default in payment of the composition was to remit the plaintiff to the position he occupied before the proceedings in respect of the composition, and that consequently where an order had been made for payment by the defendant proceedings could be taken on such order for non-compliance with it on such default: *Newell v. Van Praagh*, L. R., 9 C. P., 96.

As to what is meant by the term "visible means," see *Lea v. Parker*, 13 Q. B., 835.

Judge that the party had when summoned, or, since the judgment was obtained against him, has had sufficient means and ability to pay the debt or damages, or costs recovered against him, either altogether or by the instalments which the court in which the judgment was obtained has ordered, and if he has refused or neglected to pay the same at the time ordered, whether before or after the return of the summons,

the Judge may, if he thinks fit, order such party to be committed to the common gaol of the county in which the party so summoned resides or carries on his business, for any period not exceeding forty days. R. S. O. 1877, c. 47, s. 182.

In what cases only the party summoned may be committed for non-attendance costs allowed him in certain cases.

241. (g) A party failing to attend according to the requirements of such summons, shall not be liable to be committed to gaol for the default, unless the Judge is satisfied that such non-attendance is wilful, or that the party has failed to attend after being so summoned; and if at the hearing it appears to the Judge, upon the examination of the party or otherwise,

By the express terms of this Section the case of *Evans v. Wills*, 1 C. P. D., 229, would not apply, and the debtor could be committed more than once.

As to proceedings against a married woman, see also *Poole v. Canning* L. R., 2 C. P., 241; 3 *Mews' Digest*, 83-85; L. R., 8 Irish, 25; D. C. Law 1885, 77, pages 244-248, *ante*.

As already remarked in these pages, there is no power in a Judge to make the debt payable by instalments, and on default of payment of any instalment that the defendant be committed: *R. v. Judge of Brompton County Court*, 18 Q. B. D., 213; In H. of L., 84 L. T. Journal, 173; *Re Woltz v. Blakely*, 11 P. R. 430; *Chichester v. Gordon*, 25 U. C. R., 527.

(g) *Sinclair's D. C. Act*, 1879, 194, 195; D. C. Act, 1880, 92.

It is often a difficult matter to determine when a defendant's failing to attend on judgment summons is a wilful non-attendance. It is also difficult to say whether the Judge should receive evidence affirmatively shewing that fact, or whether the non-attendance of the party is *prima facie* evidence of its being "wilful." The writer has not yet come to a decided opinion either way, but

that he ought not to have been so summoned, or if at the hearing the judgment creditor does not appear, the Judge shall award the party summoned a sum of money by way of compensation for his trouble and attendance, to be recovered against the judgment creditor in the same manner as any other judgment of the court. R. S. O. 1877, c. 47, s. 183; 43 V. c. 8, s. 60.

242. (h) Where an order of commitment as aforesaid has been made, the clerk of the court shall issue, under the seal of the court, a warrant of commitment directed to the bailiff of any Division Court within the county, and the bailiff may by virtue of the warrant take the person against whom the order has been made. R. S. O. 1877, c. 47, s. 184.

Commitment in case of refusal

usually gives a debtor a second chance for fear that sickness or some other calamity may have befallen him.

If at the hearing and after examination it appears that the defendant ought not to have been summoned, or if the judgment creditor did not appear at all, the Judge "shall award" the party summoned a sum of money by way of compensation for his trouble and attendance.

The words "shall award" appear to leave the Judge no discretion in the matter, if application is made, but are imperative. The Judge could properly award the party summoned "a sum of money by way of compensation for his trouble and attendance" if there should be a violation of Section 239. This is mentioned as an instance. There may, no doubt, be other cases.

(h) Sinclair's D. C. Act, 1879, 195.

This Section prescribes in what form, by whom and to whom the warrant of commitment shall be made and executed.

In *Sandon v. Jarvis, E. B. & E., 935*, it was held that a Sheriff's officer, under execution of a *ca. sa.*, by putting his hand into the debtor's dwelling-house by an opening in a window caused by a pane having been broken in the scuffle, but not by the officer, touched the debtor, who was inside the house, and then said "You are my prisoner"—was an arrest.

But if an officer opened a window (which was shut but not fastened) of a house for the purpose of making an arrest, it would seem that the arrest is unlawful: *Nash v. Lucas, L. R., 2 Q. B., 590*; *Anglehart v. Basher, 37 C. P., 97*.

A Bailiff could be held responsible for not arresting: *Burham v. Hall, 15 L. J. N. S., 204*.

If it had not been for D. C. Rule 101, there would not be a limit to the time within which a warrant of commitment could be executed: *Hermage v. Kilpin, L. R., 9 Ex., 205*.

Constables,
etc., to
execute
warrants.

243. (i) All constables and other peace officers within their respective jurisdictions shall aid in the execution of every such warrant, and the gaoler or keeper of the gaol of the county in which the warrant has been issued, shall receive and keep the defendant therein until discharged under the provisions of this Act or otherwise by due course of law. R. S. O. 1877, c. 47, s. 185.

When
debtor in
custody
shall be
dis-
charged.

244. (j) Any person imprisoned under this Act, who has satisfied the debt or demand, or any instalment thereof payable, and the costs remaining due at the time of the order of imprisonment being made, together with the costs of obtaining the order, and all subsequent costs, shall, upon the certificate of such satisfaction, signed by the clerk of the court, or by leave of the Judge of the court in which the order of imprisonment was made, be discharged out of custody. R. S. O. 1877, c. 47, s. 186.

We do not see that the Bailiff could after arrest properly receive the debt and costs and discharge the debtor from custody: *Arnott v. Bradley*, 23 C. P., 1; *Burnham v. Hall*, 44 U. C. R., 297. See Sections 216 and 244.

For Forms of Judge's orders of adjudication in cases under this Section, see D. C. Law, 1884, 292-296, and *post*.

As to arrest generally, see 6 Mews' Digest, 1108-1121; *Watson on Sheriff*, 125-217; R. & J., 188-213, 4234-4236; Ont. Digest, 1884, 20-22; Ont. Digest, 1887, 16; *Sinclair's D. C. Act*, 1879, 195-197, 261; *Stonor v. Fowle*, 84 L. T. Journal, 173; 3 Mews' Digest, 78-88.

(i) *Sinclair's D. C. Act*, 1879, 196, 197.

This enjoins all constables and other peace officers within their respective jurisdictions to aid in the execution of every such warrant (R. v. *Sherlock*, L. R., 1 C. C., 20, and pages 29 and 30 *ante*), and declares that the keeper of the gaol of the County in which the warrant has been issued shall receive and keep the defendant until duly discharged.

It would seem from the previous Section and this that the defendant could only be arrested within the County where the warrant issued.

(j) *Sinclair's D. C. Act*, 1879, 197.

The gaoler would have no power under this Section to receive the money and allow the defendant to go at large: *Arnott v. Bradley*, 23 C. P., 1; *Arch. Pract.*, 12th Ed., 702.

The proper course to pursue would be to pay the amount to the Clerk of the

245. (k) The Judge before whom the summons is heard may, if he thinks fit, rescind or alter any order for payment previously made against a defendant so summoned before him, and may make any further or other order, either for the payment of the whole of the debt or damages recovered and costs forthwith, or by instalments, or in any other manner that he thinks reasonable and just. R. S. O. 1877 c. 47, s. 187.

Judge may make order and may alter and modify the same.

246. (l) In case the defendant in an action brought in a Division Court has been personally served with the summons to appear, or personally appears at the trial, and judgment is given against him, the Judge, at the hearing of the cause or at an adjournment thereof, may examine the defendant and the plaintiff and any other person touching the several things hereinbefore mentioned, and may commit the defendant to prison, and make an order in like manner as he might have done in case the plaintiff had obtained a summons for that purpose after judgment. R. S. O. 1877, c. 47, s. 188.

When parties may be examined.

Court from which the warrant issued, get a certificate from him of such satisfaction, upon which or by order of the Judge the defendant would be entitled to his discharge.

(k) Sinclair's D. C. Act, 1879, 197.

By this Section power is given to the Judge to rescind or alter any order for payment previously made against defendant on a judgment summons, and he may make any further or other order for the payment of the debt or damages that to him seems reasonable and just.

(l) Sinclair's D. C. Act, 1879, 197, 198.

Power is given by this Section for the Judge to examine the defendant in the same way as under judgment summons, if he has been personally served with the summons to appear or should personally appear at the trial and judgment go against him. Power is also given to examine all other parties touching the several things upon which he may be examined, and can make an order with the same effect as if the plaintiff had obtained a summons and the defendant had been examined thereon. This power is not frequently resorted to in practice. It would be a saving of expense in many cases.

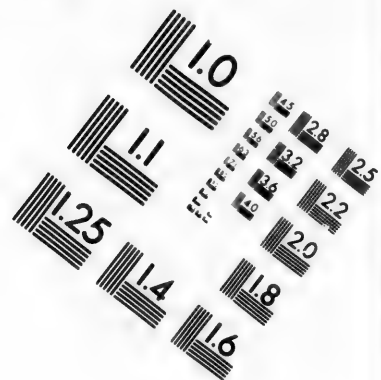
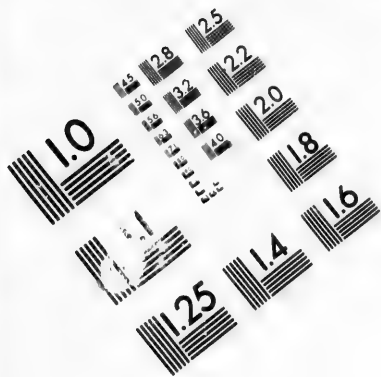
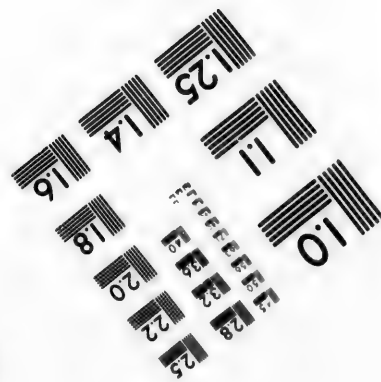
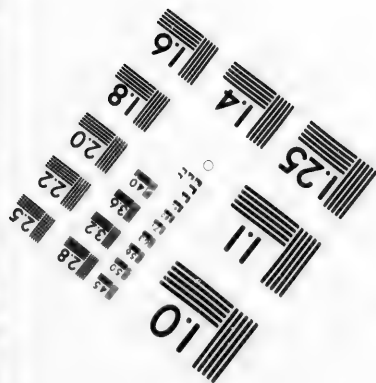
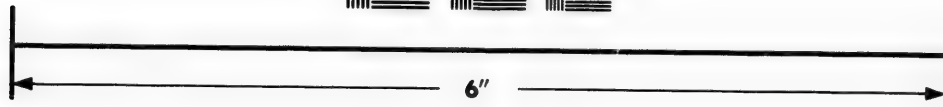
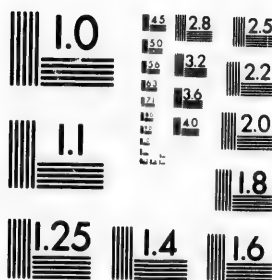
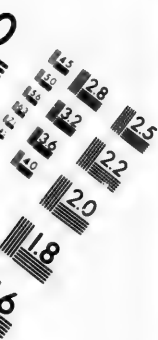


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Debt not
to be
extin-
guished
by im-
prison-
ment.

247. (m) No imprisonment under this Act shall extinguish the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being summoned anew and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this Act, or deprive the plaintiff of any right to take out execution against the defendant. R. S. O. 1877, c. 47, s. 189.

Returns
by Judges
of judg-
ment
debtors
com-
mitted.

248. (n) Every Judge of a County Court shall make a return to the Provincial Secretary on or before the 15th day of January in every year, shewing the number of judgment debtors who, during the twelve months ending the 31st of December previously, were ordered to be committed under each of the five heads mentioned in section 240 of this Act; and the clerk of every Division Court shall, on or before the 1st day of said month of January, send to the Judge the necessary information in writing for the purposes of such return. 43 V. c. 8, s. 58; 48 V. c. 14, s. 2.

ABSCONDING DEBTORS.

Abscond-
ing
debtors.

249. (o) In case a person, being indebted in a sum not exceeding \$100, nor less than \$4,

(m) Sinclair's D. C. Act, 1879, 198.

At Common Law imprisonment on final process was generally considered a satisfaction of the plaintiff's debt. This Section declares that imprisonment shall not extinguish the debt or other cause of action for which the judgment is obtained: See *Evans v. Wills*, 1 C. P. D., 229.

(n) Sinclair's D. C. Act, 1880, 90; Sinclair's D. C. Law, 1885, 38-40.

This Section imposes upon the Judge the duty of making this return, provided the Clerks give him the information therefor.

(o) Sinclair's D. C. Act, 1879, 199-202.

See also D. C. Act, 1880, 12, 13; D. C. Law, 1884, 226, 231-235; D. C. Law, 1885, 66, 84; D. C. Act, 1886, 50-53, 118.

In addition to the authorities which are referred to in the pages just mentioned, we have also to refer to the following:

for any debt or damages arising upon a contract, express or implied, or upon a judgment,

1. Absconds from this Province, leaving personal property liable to seizure under execution for debt in any county in Ontario ;

2. Attempts to remove such personal property, either out of Ontario or from one county to another therein ;

3. Keeps concealed in any county to avoid service of process and in case any creditor of such person, his servant or agent makes and produces an affidavit or affirmation to the purport of the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, and in case the affidavit or affirmation be filed with the clerk of any Division Court in Ontario, then the

In *Smith v. Smith*, 9 P. R., 511, it was held that a defendant having contracted a debt in the United States, his ordinary place of abode, and in the act of returning there after a visit to his parents in this country, could not be arrested on a charge of leaving Ontario with intent to defraud his creditors. It is of no consequence where the domicile of a person may be or to what country he is bound by allegiance as a subject or citizen, if he come to this Province and reside here and contract debts and is about to quit the country (that is, in effect, about to change his residence to a foreign country, even if that country be his place of domicile) with intention to defraud his creditors, he is subject to arrest as an absconding debtor in this Province: See also *Lamond v. Eiffe*, 3 Q. B., 910; *Clement v. Kirby*, 7 P. R., 104.

Held, that a defendant could not rely on a change of residence to a foreign country so as to avoid the law of arrest to which he was subject in this Province at the time he incurred the debt upon which the action is brought, without that change of residence has been effected by a fraudulent flight to avoid arrest: *Kersterman v. McLellan*, 10 P. R. 122.

Temporary absence on a trip to Europe was held not to justify an arrest, nor could it be said in such case that a man "absconds": *Shaw v. McKenzie*, 6 Sup. R., 181.

There cannot be a judgment against an absconding debtor where there has been no property attached, except upon proper service of the summons: *Per Draper, C. J.*, in *Offay v. Offay*, 26 U. C. R., p. 364; See also the notes to Section 100 of this Act.

On the general subject, Who is an absconding debtor? see R. & J., 1, 4194; Ont. Digest, 1884, 1; Ont. Digest, 1887, 1; *Ex parte Gutierrez*. In re Gutierrez, 11 Ch. D., 298; *Butler v. Rosenfeldt*, 16 L. J. N. S., 54; *Robertson v. Coulton*, 9 P. R., 16.

In addition to the case of *Caudle v. Seymour*, 1 Q. B., 889, cited at page 201

clerk upon the application of the creditor, his servant or agent, shall issue a warrant under the hand and seal of the clerk, in the form prescribed by such General Rules and Orders, directed to the bailiff of the Division Court within whose division the same is issued, or to a constable of the county, commanding the bailiff or constable to attach, seize, take and safely keep all the personal estate and effects of the absconding, removing or concealed person within the county, liable to seizure under execution for debt, or a sufficient portion thereof to secure the sum mentioned in the warrant, with the costs of the action, and to return the warrant forthwith to the court out of which the same issued. R. S. O. 1847, c. 47, s. 190.

of Sinclair's D. C. Act, 1879, see also R. v. Hughes, 4 Q. B. D., 622; McLean v. Bradley, 2 Sup. R., 535.

Any constable of the County would have power to execute a warrant of attachment: *Delany v. Moore*, 9 U. C. R., 294.

As will be observed in note (d) at page 200 of Sinclair's D. C. Act, 1879, the mere intention of removing personal property would not be sufficient. The attempt to remove or removal itself of any part of a debtor's personal property would justify an attachment under this Section upon which *all the personal estate and effects* of the absconding debtor would be subject to seizure, or such part as is necessary to secure the sum mentioned in the warrant.

Should the Bailiff make the money, he could not apply it on any execution in his hands against the attaching creditor: *Sharpe v. Leitch*, 2 L. J. N. S., 132.

The warrant must be under the seal of the Clerk. The Bailiff should make a written return thereto, to be filed with the papers. If nothing has been seized under the attachment, the plaintiff can only proceed as in an ordinary case: *O'flay v. O'flay*, *supra*.

Sometimes a judgment is attempted to be obtained improperly by attachment proceedings, in disregard of this rule. See also Sinclair's D. C. Act, 1880, 13; Sinclair on Absconding Debtors, and page 81 *ante*.

If the Bailiff cannot be found to execute the attachment and a constable is resorted to, care must be taken to see that he is a constable duly appointed: R. S. O., Chap. 82. Many people consider themselves constables when in law they are not.

On the subject of attachment generally, see Sinclair's D. C. Act, 1879, 246, 247.

250. (p) Any County Judge, or a Justice of the Peace for the County, may take the affidavit in the last preceding section mentioned, and upon the same being filed with the Judge or Justice, the Judge or Justice may issue a warrant under his hand and seal in the form prescribed as aforesaid, and the Judge or Justice shall forthwith transmit the affidavit to the clerk of the Division Court within whose division the same was made or taken, to be by him filed and kept among the papers in the cause. R. S. O. 1877, c. 47, s. 191.

When Justice of the Peace may issue attachments, etc.

251. (q) Upon receipt of the warrant by the bailiff or constable, and upon being paid his lawful fees, including the fees of appraisement, the bailiff or constable shall forthwith execute the warrant, and make a true inventory of all the estate and effects which he seizes and takes by virtue thereof,

Bailiff or constable to seize and make inventory.

(p) Sinclair's D. C. Act, 1879, 203, 204.

If an attachment is maliciously issued and without probable cause, an action for damages for such wrong would lie at the suit of the debtor against the attaching creditor: Drake on Attachment, 5th Ed., ss. 724-745; Pollock on Torts, 23d, 235.

If there should be reasonable and probable cause for issuing an attachment, the action would not lie, no matter how maliciously issued. If a person has a right to do an act, and does it maliciously, yet it is not actionable: Shirley's Leading Cases, 3rd Ed., 354.

As to reasonable and probable cause, see the same work at that and following four pages.

Should an attaching creditor place the warrant of attachment for execution in the hands of some one unauthorized by Statute—for instance, one who is not a duly appointed constable—he would simply be liable as a trespasser.

(q) Sinclair's D. C. Act, 1879, 204, 205.

The lawful fees of the Bailiff, including fees of appraisement, shall be paid to the Bailiff or Constable before execution of the warrant. It is his option to execute it or not unless his fees are prepaid, but if he waives prepayment he would be bound to execute the warrant and be as responsible as if he had exacted prepayment of fees. His duty otherwise will be found pointed out at pages 204 and 205 of Sinclair's D. C. Act, 1879; D. C. Act, 1880, 115, 116, and pages cited; D. C. Law, 1884, 252, and pages cited; D. C. Law, 1885, 287, and pages cited; D. C. Act, 1886, 132, 133, and pages cited.

and shall within twenty-four hours after seizure, call to his aid two freeholders, who being first sworn by him to appraise the personal estate and effects so seized, shall then appraise the same and forthwith return the inventory attached to the appraisal to the clerk of the court in which the warrant is made returnable. R. S. O. 1877, c. 47, s. 192.

Proceedings may be continued in court out of which attachment issued.

252. (r) In any case commenced by attachment, in a Division Court, the proceedings may be conducted to judgment and execution in the Division Court of the Division within which the warrant of attachment issued. R. S. O. 1877, c. 47, s. 193.

Proceedings commenced before attachment to continue.

253. (s) Where proceedings have been commenced in any case before the issue of an attachment, the proceedings may be continued to judgment and execution in the Division Court within which the proceedings were commenced. R. S. O. 1877, c. 47, s. 194.

Property attached may be sold under execution.

254. (t) The property seized upon a warrant of attachment shall be liable to seizure and sale under the execution to be issued upon the judgment, or in case the property was

(r) Sinclair's D. C. Act, 1879, 205, 246.

This Section declares in what Division the suit may be continued to judgment and execution, viz., in the Division Court of that particular Division within which the warrant of attachment issued.

(s) Sinclair's D. C. Act, 1879, 205, 206.

This Section presumes that the action was commenced in the proper Division. If an attachment is subsequently issued, the proceedings may be continued in the Division within which they were commenced.

(t) Sinclair's D. C. Act, 1879, 206.

This Section provides for two cases—

(1) If there is judgment in the case, the party in whose favor it is may have the property seized under execution.

(2) If the goods are perishable and have been sold, the proceeds of them shall be applied in satisfaction of the judgment.

perishable, and has been sold, the proceeds thereof shall be applied in satisfaction of the judgment. R. S. O. 1877, c. 47, s. 195.

255. (u) No plaintiff shall divide any cause of action into two or more actions for the purpose of bringing the same within the provisions of the preceding sections, but a plaintiff having a cause of action above the value of \$100 and not exceeding \$200 for which an attachment might be issued if the same were not above the value of \$100 may abandon the excess, and upon proving his case, may recover to an amount not exceeding \$100 and the judgment of the court in such case shall be in full discharge of all demands in respect of such cause of action, and the entry of judgment therein shall be made accordingly. R. S. O. 1877, c. 47, s. 196.

Plaintiff
not to
divide
cause of
action.

256. (v) In case several attachments issue against any party then subject to the provisions contained in section 16 of *The Act respecting Absconding Debtors*, the proceeds of the goods and chattels attached shall not be

If several
attach-
ments
issued.

We do not think in the latter case that the Bailiff would be entitled to poundage on selling the chattels as perishable goods and then on his execution as well. He would only be entitled to *one* poundage.

(u) Sinclair's D. C. Act, 1879, 206.

As to dividing any cause of action into two or more actions for the purpose of bringing the same in the Division Court the reader is referred to Section 77 of this Act and the notes thereto. The object is to prevent a person dividing, or "splitting," a cause of action for the purpose of issuing an attachment in the Division Court and to allow him to abandon the excess of his claim beyond the jurisdiction of the Court. The judgment is made conclusive, and the entry of it is to be made accordingly.

(v) Sinclair's D. C. Act, 1879, 206, 207.

This Section makes provision for the distribution of the proceeds of the goods and chattels attached.

Some difficulty has been experienced by Clerks as to the proper method of distributing the proceeds of goods, and more especially where they are insufficient to pay the full claims of all attaching creditors, together with their

Rev. Stat.
c. 66, s. 16.

paid over to the attaching creditor or creditors according to priority, but shall be ratably distributed among such of the creditors suing out such attachments as obtain judgment against the debtor, in proportion to the amount really due upon such judgments; and no distribution shall take place until reasonable time, in the opinion of the Judge, has been allowed to the several creditors to proceed to judgment. R. S. O. 1877, c. 47, s. 197.

If goods
insuffici-
ent.

257. (w) Where the goods and chattels are insufficient to satisfy the claims of all the attaching creditors, no such creditor shall be allowed to share unless he sued out his attachment, and within one month next after the issue of the first attachment, gave notice thereof to the clerk of the court out of which the first attachment issued, or in which it was made returnable. R. S. O. 1877, c. 47, s. 198.

costs. It is submitted that the proper method is for a Clerk to make up the costs in each case, add the same to the debt and interest, and therefrom make an equal distribution of the proceeds. The method sometimes adopted of Clerks deducting the total amount of costs from the total proceeds of the sale of the goods attached, and distributing the balance, is not correct. The costs which a plaintiff incurs stand in no higher position than his debt.

All necessary disbursements and expenses of the Bailiff for keeping the attached goods form a first charge upon them and are deductible from the total proceeds before any *pro rata* distribution is made. See Sec. 258.

The Clerks, of course, should be paid their costs in such cases as this Section provides for, but each man's indebtedness to the Clerk for costs must be paid out of his *pro rata* share of the proceeds. The words "the amount really due upon such judgments" include costs as well as debt and interest.

(w) Sinclair's D. C. Act, 1879, 207.

See *Macfie v. Pearson*, 8 Ont. R., 745. If a creditor has not issued his attachment within one month next after the issue of the first attachment and has given notice to the Clerk of the Court out of which the first attachment issued or in which it was made returnable, he cannot participate in the proceeds of the property attached.

The notice must now be in writing, under Section 93 of this Act.

Both acts which the creditor is bound to do must be within the month next after the issue of the first attachment—that is, the issuing of his attachment and his giving notice to the Clerk. The day of issuing the first attachment is, of course, excluded from calculation. It is doubtful if duly depositing the

258. (x) (1) All the property seized under the provisions of the previous sections, shall be, and remain in the custody and possession of the bailiff to whom the warrant of attachment is issued, and he shall take and keep the same until disposed of by law, and he shall be allowed all necessary disbursements and expenses for keeping the same.

Custody
of goods
seized
under at-
tach-
ment.

(2) Where the property is seized under the provisions of the preceding sections by a county constable, it shall be forthwith handed over to the custody and possession of the bailiff of the court, out of which the warrant of attachment issued, or into which it was made returnable; and such bailiff shall take the same into his charge and keeping, and shall be allowed all necessary disbursements for keeping the same. 49 V. c. 15, s. 14.

notice in the post-office would be sufficient if it did not reach the Clerk until after the month had expired. See *Marshall v. Jamieson*, 42 U. C. R., 120; *Nasmith v. Manning*, 5 App. R., 126; *Byrne v. Van Tienhoven*, 5 C. P. D., 344, 348.

(z) *Sinclair's D. C. Act*, 1879, 207, 208; *D. C. Act*, 1886, 50, 51.

Formerly the law was that all the property seized was to be forthwith handed over to the custody and possession of the Clerk of the Court out of which the warrant of attachment issued or into which it was made returnable, but in the year 1886 a change was made in that respect.

The change which has here been made in the law is simply this: that goods seized by a Division Court Bailiff under an attachment issued under the provisions of the Division Courts Act are not now to be delivered over by the Bailiff to the Clerk, but instead thereof are to remain in the custody and possession of the Bailiff to whom the warrant of attachment issued. He is not to dispose of the same, but to keep them until disposed of by law, and for which he is to be allowed all necessary disbursements and expenses for keeping the same.

If property is seized by a County Constable (which it seldom is) it is by this Section to be handed over to the custody and possession of the Bailiff of the Court out of which the warrant of attachment issued or into which it was made returnable. This is a much more reasonable way of disposing of the chattels than formerly existed. If such property is to remain in the custody of any officer of the Court, it had much better be in the hands of the Bailiff (who usually has a much better means of keeping it) than the Clerk of his Court. The Bailiff is allowed all necessary disbursements and expenses of keeping the same. Great care will have to be observed by Clerks in this matter by seeing that Bailiffs do not overcharge for keeping possession of goods attached. It is

On what
terms
goods at-
tached
may be
restored.

259. (y) In case a person against whose estate or effects such attachment has issued, or any person on his behalf, at any time prior to the recovery of judgment in the cause, executes and tenders to the creditor who sued out the attachment, and files in the court to which the attachment has been returned, a bond with good and sufficient sureties, to be approved of by the Judge or Clerk, binding the obligors, jointly and severally, in double the amount claimed, with condition that the debtor (naming him) will, in the event of the claim being proved and judgment recovered thereon, as in other cases where proceedings have been commenced against the person, pay the same, or the value of the property so taken and seized, to the claimant or claimants, or produce the property whenever thereunto required, to satisfy the judgment, the clerk may supersede the attachment, and the property attached shall then be restored. R. S. O. 1877, c. 47, s. 200.

If the
debtor
does not
appear.

260. (z) If within one month from the seizure as aforesaid, the party against whom the attachment issued, or some one on his behalf, does not appear and give such bond,

to be regretted that the Legislature has not, under certain restrictions, allowed the sale of such goods before judgment. In most cases a sale would be in the interest not only of the debtor but of the creditor as well.

For a discussion of the law of attachment in the Division Courts, see Sinclair's D. C. Act, 1879, 199-213.

(y) Sinclair's D. C. Act, 1879, 208, 209.

This Section makes provision how the attachment may be superseded and the property attached restored to the defendant. See the remarks at the above pages.

(z) Sinclair's D. C. Act, 1879, 209, 210.

If the bond mentioned in the next preceding Section is not given within one month (that is exclusive of the day of seizure), execution may issue as soon as the judgment has been obtained, and the property seized on the attachment

execution may issue as soon as judgment has been obtained upon the claim or claims, and the property seized upon the attachment, or enough thereof to satisfy the judgment and costs may be sold for the satisfaction thereof, according to law, or if the property has been previously sold as perishable under the provisions hereinafter made, enough of the proceeds thereof may be applied to satisfy the judgment and costs. R. S. O. 1877, c. 47, s. 201.

261. (a) Where the property of any person has been seized under a warrant of attachment as aforesaid, and a summons has been personally served on such person before seizure then the trial of the cause shall be proceeded with as if no such warrant of attachment had been issued, and after judgment execution shall forthwith issue unless otherwise ordered by the Judge. R. S. O. 1887, c. 47, s. 202.

If summoned personally.

262. (b) Subject to the provisions contained in sections 14 and 16 of *The Act respecting Absconding Debtors*, in order to proceed in the recovery of any debt due by the person against

Proceedings against debtors where process not previously served.

sold under such judgment. If the property was perishable, it may have been sold under Section 263.

(a) Sinclair's D. C. Act, 1879, 210.

This Section provides that where property has been seized and a summons has been *personally* served on the defendant, the trial of the cause shall be proceeded with as if no attachment issued. It must be observed that where an attachment issues and no property is seized under it, the summons cannot be served in the manner pointed out by Section 262 (*Offay v. Offay*, 26 U. C. R., 364, *per* DRAPER, C. J.), but must be served in the ordinary way. Possibly if the claim is under \$8.00 the summons must even be served personally. On that however no opinion is expressed.

(b) Sinclair's D. C. Act., 1879, 210, 211.

This Section makes provision for the service of process in cases of attachment. It will be observed that a summons for the recovery of any debt may be served either personally (as to which, see Sinclair's D. C. Act, 1879, 93-95, and notes to Section 99 hereto) or by leaving a copy at the last known place of abode, trade or dealing of the defendant, with any person there dwelling, or by leaving

Rev. Stat.
c. 66, ss.
14 and 16.

whose property an attachment issues, where process has not been previously served, the same may be served either personally or by leaving a copy at the last place of abode, trade or dealing of the defendant, with any person there dwelling, or by leaving the same at the said dwelling, if no person be there found; and in every case, all subsequent proceedings shall be conducted according to the usual course of practice in the Division Courts; and if it appears to the satisfaction of the Judge on the trial, upon affidavit, or other sufficient proof, that the creditor who sued out an attachment had not reasonable or probable cause for taking the proceedings, the Judge shall order that no costs be allowed to the creditor or plaintiff, and no costs in such case shall be recovered in the cause. R. S. O. 1877, c. 47, s. 203.

the same at the said dwelling if no person be there found. It is important that the affidavit of service, when service has not been personal, should shew a strict compliance with the Statute. If the summons has not been served as required by this Section, the plaintiff could not properly proceed to judgment in attachment.

A salutary provision exists in the concluding part of this Section. Should it appear to the satisfaction of the Judge on the trial, upon affidavit or other sufficient evidence, that the creditor who sued out the attachment had not reasonable or probable cause for taking such proceedings, the Judge has the power to order that no costs be allowed to such creditor.

As we have already remarked at page 259, if a creditor improperly issues an attachment to the injury of the debtor he would be held liable in damages therefor: *Drake on Attachment*, 5th Ed., ss. 724, 725; *Cartwright v. Hinds*, 3 Ont. R., 384-395.

For Forms of Affidavit in such cases, see *Sinclair's D. C. Law*, 1884, 233-235; *Hagerty v. G. W. Ry. Co.*, 44 U. C. R., 319.

The following are the two Sections of the Absconding Debtors' Act (R. S. O., Chap. 66, Secs. 14 and 16) to which the Division Courts Act, in respect to absconding debtors, is made subject:

PERISHABLE PROPERTY.

"14. In case horses, cattle, sheep, pigs, or perishable goods or chattels, or such as from their nature (as timber or staves) cannot be safely kept or conveniently taken care of, are taken under a writ of attachment, the sheriff who attached the same shall have them appraised and valued, on oath, by two competent persons; and in case the plaintiff desires it and deposits with the sheriff a bond to the defendant executed by two freeholders (whose sufficiency

263. (c) Subject to the provisions contained in sections 14 and 16 of *The Act respecting Absconding Debtors*, in case horses, cattle, sheep or other perishable goods have been taken upon an attachment, the bailiff of the court who has the custody or keeping thereof (the same having been first appraised, in the manner in section 251 of this Act mentioned), may at the request of the plaintiff who sued out the warrant of attachment, expose and sell the same at public auction, to the highest bidder, giving at least eight

Perish-
able
goods,
how dis-
posed of

Rev. Stat.
c. 40, ss.
11 and 16.

shall be approved of by the sheriff), in double the amount of the appraised value of the articles, conditioned for the payment of the appraised value to the defendant, his executors or administrators, together with all costs and damages incurred by the seizure and sale thereof, in case judgment is not obtained by the plaintiff against the defendant, then the sheriff shall proceed to sell all or any of such enumerated articles at auction, to the highest bidder, giving not less than six days' notice of the sale, unless any of the articles are of such a nature as not to allow of that delay, in which case the sheriff may sell such articles last mentioned forthwith; and the sheriff shall hold the proceeds of the sale for the same purposes as he would hold property seized under the attachment. R. S. O. 1877, c. 68, s. 14.

WHEN DIVISION COURT ATTACHMENT SUPERSEDED.

"**16.** If the sheriff to whom a writ of attachment is delivered for execution, finds any property or effects, or the proceeds of any property or effects which have been sold as perishable, belonging to the absconding debtor named in the writ of attachment, in the custody of a constable or of a bailiff or clerk of a Division Court by virtue of a warrant of attachment issued or money paid into Court under a garnishee summons under *The Division Courts Act*, the sheriff shall demand and take from the constable, bailiff or clerk, the property or effects, or the proceeds of any part thereof and the constable, bailiff or clerk, on demand by the sheriff and notice of the writ of attachment, shall forthwith deliver all the property, effects and proceeds aforesaid to the sheriff, upon penalty of forfeiting double the value of the amount thereof, to be recovered by the sheriff, with costs of suit, and to be by him accounted for after deducting his own costs, as part of the property and effects of the absconding debtor; but the creditor who has duly sued out the warrant of attachment may proceed to judgment against the absconding debtor in the Division Court, and on obtaining judgment, and serving a memorandum of the amount thereof, and of the costs to be certified under the hand of the clerk of the Division Court, the creditor shall be entitled to satisfaction in like manner as, and in ratable proportion with, the other creditors of the absconding debtor who obtain judgment as hereinafter mentioned. R. S. O. 1877, c. 68, s. 16; 48 V. c. 15, s. 2."

(c) *Sinclair's D. C. Act*, 1879, 211; *Sinclair's D. C. Act*, 1886, 50, 51.

As will be seen by comparing the Section as it now stands with what it was originally, a change has been made in the law relative to the possession of

days' notice at the office of the bailiff of the said court, and at two other public places within his division, of the time and place of the sale, if the articles seized will admit of being so long kept, otherwise he may sell the same at his discretion. R. S. O. 1877, c. 47, s. 204; 49 V. c. 15, s. 15.

Creditor
to give
bond to
indem-
nify the
defend-
ant.

264. (d) It shall not be compulsory upon the bailiff or constable to seize, or upon the bailiff to sell such perishable goods, until the party who sued out the warrant of attachment has given a bond to the defendant therein, with good and sufficient sureties in double the amount of the appraised value of the goods, conditioned that the party directing the seizure and sale will repay the value thereof, together with all costs and damages incurred in consequence of the seizure and sale, in case judgment be not obtained for the party who sued out such attachment, and the bond shall be filed with the papers in the cause. R. S. O. 1877, c. 47, s. 205; 49 V. c. 15, s. 15.

goods attached. Formerly the goods were delivered to the custody and keeping of the Clerk of the Court; now the right of possession of them is vested in the Bailiff.

It will be seen that the Bailiff is not bound to expose or sell perishable property except at the request of the plaintiff who sued out the warrant of attachment, which he had better take, if possible, in writing.

The goods must be exposed and sold at public auction and to the highest bidder. If the perishable property will not permit of its being kept so that the Bailiff may give eight days notice, he may sell the same at once. Such property as meat, fruit or vegetables should be dealt with in this way. If the property is not of a perishable description the Bailiff should advertise and sell as the Section directs.

A discretion is vested in the Bailiff in regard to the speedy sale of perishable property, and if he did not exercise a proper and reasonable discretion in regard to it, and damage ensued, he and his sureties would be responsible for it on their Covenant.

(d) Sinclair's D. C. Act, 1879, 212; D. C. Act, 1886, 52.

In the case of perishable goods this Section provides that it is not compulsory on the Bailiff or constable to seize, or upon the Bailiff to sell, such goods, until the party who sued out the attachment has given the bond here prescribed. In

265. (e) The moneys so made shall be by the bailiff paid over to the clerk, and the residue, if any, after satisfying such judgments, with the costs thereupon, shall be delivered to the defendant or his agent, or to any person in whose custody the goods were found; and the responsibility of the clerk in respect of such property shall cease. 49 V. c. 15, s. 16.

Residue,
how dis-
posed of.

266. (f) A bond given in the course of any proceeding under this Act may be sued in any Division Court of the county wherein the same was executed, and proceedings may be thereupon carried on to judgment and execution in such court, notwithstanding the penalty contained in the bond may exceed the sum of \$100. R. S. O. 1877, c. 47, s. 207.

Bond
may be
sued in
the Divi-
sion Court.
Judge
may de-
liver up
bond.

267. (g) Every such bond shall be delivered up to the party entitled to the same, by the

many cases, from the uncertain character of the property, it would be unjust to impose upon such officers the risk of seizure and sale without their being adequately indemnified.

(e) Sinclair's D. C. Act, 1886, 53, 54.

We have nothing to add to the remarks there made. The residue of the money, if any, must be paid over as the Section requires. If not so paid, the party entitled could maintain an action therefor.

(f) Sinclair's D. C. Act, 1879, 213.

In order to retain the Division Court as that in which certain proceedings relative to that Court may be sued, it is here provided that a bond given in the course of any proceeding under the Act may be sued in any Division Court of the County wherein the same was executed. It matters not what the penalty of the bond may be—whether otherwise beyond the jurisdiction of the Court or not—it is by this Section made suable in that Court. This would not deprive a party of the right to sue upon such bond in any higher Court, except at the risk of losing and having to pay the costs of such Court.

In an action on any such bond by the assignee of the Bailiff, Set-off could be pleaded, the penalty of the bond being considered as the debt: *McKelvey v. McLean*, 34 U. C. R., 635.

Since the existence of Counter-claim, we see no reason why a defendant should not have the right to set the same up in such action.

(g) Sinclair's D. C. Act, 1879, 213.

When a bond given in any Division Court proceeding has served its purpose, the Judge of the Court may order the same to be delivered up, to be enforced, or cancelled, as the case may require.

order and at the discretion of the Judge of the court, to be enforced or cancelled, as the case may require. R. S. O. 1877, c. 47, s. 208.

CLAIMS OF LANDLORDS AND OTHERS IN RESPECT
TO GOODS SEIZED.

Interpre-
tation of
the words
"Land-
lord."

268. (h) (1) In the next six sections, the word "landlord" shall include the person entitled to the immediate reversion of the land, or, if the property be held in joint tenancy, coparcenary or tenancy in common, shall include any one of the persons entitled to the reversion; and

"Agent."

(2) The word "agent" shall mean any person usually employed by the landlord in the letting of lands or in the collection of the rents thereof, or specially authorized to act in any particular matter by writing under the hand of the landlord. R. S. O. 1877, c. 47, s. 209.

Claims of
landlords,
etc., to
goods
seized in
execu-
tion, how
to be
adjusted.

269. (i) (1) In case a claim be made to or in respect of any goods or chattels, property or security, taken in execution or attached under the process of a Division Court, or in respect of the proceeds or value thereof, by a landlord for rent, or by a person not being the party against whom the process issued, then, subject

(h) Sinclair's D. C. Act, 1879, 213.

(i) Sinclair's D. C. Act, 1879, 214-217; D. C. Law, 1884, 267, 268; D. C. Law, 1885, 189-196; D. C. Act, 1886, 55, 56.

The reader is referred specially to the different pages of the works above cited for an exposition of the cases on the different sub-sections of this Section, and in addition thereto, in Interpleader cases, to *Richards v. Jenkins*, 18 Q. B. D., 451. It was there held, on an Interpleader issue, with regard to goods taken in execution, that where the evidence shewed that the claimant had not any interest in nor possession of the goods at the time of the seizure, but that they belonged to a third party, that the execution creditor was entitled to prevail. In that case, on the Interpleader issue between the execution creditor and the claimant, the facts were as follows: The claimant having let the goods afterwards taken in execution for hire, became bankrupt. He did not inform the trustee in bankruptcy that he owned these goods, and the hirer

to the provisions of *The Act respecting Absconding Debtors*, the clerk of the court, upon application of the officer charged with the execution of the process, may, whether before or after the action has been brought against such officer, issue a summons calling before the court out of which the process issued, or before the court holden for the division in which the seizure under the process was made, as well the party who issued the process as the party making the claim, and thereupon any action which has been brought in the High Court or in a local or inferior Court in respect of the claim, shall be stayed.

Rev. Stat.
c. 66.

When
actions
respect-
ing the
subject
matter
may be
stayed.

(2) The Court in which the action has been brought, or a Judge thereof, on proof of the issue of the summons, and that the goods and chattels or property or security were so taken in execution or upon attachment, may order the party bringing the action to pay the costs of all proceedings had upon the action after the issue of the summons out of the Division Court. R. S. O. 1877, c. 47, s. 210 (1, 2.)

Costs.

(3) The County Judge having jurisdiction in such Division Court shall adjudicate upon the claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him seems fit; and shall also adjudicate between the parties, or either of them, and the officer or bailiff in respect of any damage or claim of or to damages arising or capable of arising out of the execution of the process by the officer or bailiff, and make such order in respect thereof, and of the costs of any proceedings as to the Judge shall seem

County
Judge to
adjudi-
cate on
claims.

of the goods, being unaware of the bankruptcy, continued to pay the claimant money for the hire of them. The goods while in the possession of the hirer

fit: and the order shall be enforced in like manner as an order made in an action brought in the Division Court, and shall be final and conclusive between the parties and as between them and the officer or bailiff, except that upon the application of either the attaching or execution creditor or the claimant, or the officer or bailiff, within fourteen days after the trial, the Judge may grant a new trial upon good grounds shewn, as in other cases under this Act, upon such terms as he thinks reasonable, and may in the meantime stay proceedings. 48 V. c. 14, s. 6.

(4) In case the bailiff has more than one execution or attachment at the suit or instance of different persons against the same property claimed as aforesaid, it shall not be necessary for the bailiff to make a separate application on each execution or attachment; but he may use the names of such execution or attaching creditors collectively in such application, and the summons may issue in the name of the creditors as plaintiffs. 49 V. c. 15, s. 17.

Power to
award
damages.

(5) Under the provisions of sub-section 3 the Judge shall have power to adjudicate upon and award damages, even though the amount of the damages claimed, found or awarded should be beyond the jurisdiction of a Division Court.

(6) In respect of any damages claimed, or of any judgment, order or finding under the provisions of sub-sections 3 and 5 the parties and the bailiff applying, shall have the same rights of defence and counter-claim, including in all cases the right and liability to costs, as

were taken in execution under judgment against him. It was held, upon the above facts, assuming the execution debtor to be estopped from denying that

would exist had an action, within the jurisdiction of the Division Court, been brought to recover the said damages. 48 V. c. 14, s. 7.

270. (j) So much of the Act passed in the eighth year of the reign of Queen Anne, intitled *An Act for the better security of Rents and to prevent Frauds committed by Tenants*, as relates to the liability of goods taken by virtue of any execution, shall not be deemed to apply to goods taken in execution under the process of any Division Court, but the landlord of a tenement in which any such goods are so taken may, by writing under his hand or under the hand of his agent, stating the terms of holding and the rent payable for the same, and delivered to the bailiff making the levy, claim any rent in arrear then due to him, not exceeding the rent of four weeks when the tenement has been let by the week, and not exceeding the rent accruing due in two terms of payment where the tenement has been let for any other term less than a year, and not exceeding in any case the rent accruing due in one year. R. S. O. 1877, c. 47, s. 211.

Provisions in relation to rents due to landlords.

8 Anne, c. 14.

the goods were the claimant's such estoppel did not bind the execution creditor, and the claimant had no title to the goods as against such creditor, who was, therefore, entitled to judgment in the case.

(j) Sinclair's D. C. Act, 1879, 217-220.

The writer has little to add to the pages of the work already cited. See also 4 Mews' Digest, 1296-1683; R. & J., 2008-2096; Ont. Digest, 1884, 405; Ont. Digest, 1887, 393-403; Woodfall's L. & T.; Add. on Con., 8th Ed., 209-305; Claxton v. Sly, 1 C. L. T., 190.

The provisions of the Statute of Anne, which in other Courts regulate the rights of landlords when goods of their tenant are seized on execution, are by this Section specially exempted from Division Court jurisdiction. The rights of a landlord on seizure under Division Court process are such only as the Division Courts Act gives.

The landlord, in order to assert his rights, must do the following:

(1) By writing, under his hand or the hand of his agent (Section 269), give to the Bailiff making the levy notice of a claim for any rent in arrears and then due him, and must therein state the terms of holding,

How the
bailiff is
to pro-
ceed.

271. (k) In case of any such claim being so made, the bailiff making the levy shall distrain as well for the amount of the rent claimed, and the costs of the additional distress, as for the amount of money and costs for which the warrant of execution has issued, and shall not sell the same, or any part thereof, until after the end of eight days at least next following after the distress made. R. S. O. 1877, c. 47, s. 212.

Fees of
bailiff in
such
cases.

272. (l) For every additional distress for rent in arrear, the bailiff of the court shall be entitled to have as the costs of the distress,

(2) If the tenement is let by the week, the claim should be for four weeks rent only.

(3) If the tenement has been let for any other term less than a year, the claim should be for two terms of payment, but not exceeding in any case the rent accruing due in one year.

If the rent is not due at the time of seizure, we do not see that the landlord can properly make any claim, so that it is the Bailiff's duty to examine into this question closely before paying the landlord's rent.

We must impress on the landlord and Bailiff the necessity for a close observance of this Section, for if the landlord does not observe the requirements of it his claim might not be recognized, no matter how well founded, and if the Bailiff recognized a claim that was not founded on a proper observance of the Statute by the landlord he would be liable to the execution creditor for the money which he had so improperly paid the landlord. Mere verbal notice would not under this Section, it is submitted, be sufficient, so that in all cases a proper claim *in writing* should be given. The 1st Section of the Statute of Anne is very different from this in that respect.

If a Bailiff seizes the wrong man's goods, the Statute does not apply, and if on sale thereof he pays from the proceeds the landlord's rent, he is liable to the true owner of the goods for damages: *White v. Binstead*, 11 C. B., 304.

No time is limited for the claim to be made by the landlord, as there is under a somewhat similar Section of a Statute in England—19 and 20 Vict., Chap. 108, s. 75.

(k) *Sinclair's D. C. Act, 1879, 220.*

In addition to this reference we have only to refer to the references made in the next previous Section.

This Section points out the Bailiff's duty if a claim is made under the next previous Section. It need scarcely be said that the claim for rent must be a *valid* one and one which the Bailiff is *bound* to pay if he takes the goods. If the claim is one which he should recognize, the Bailiff shall distrain as well for the amount of the rent claimed and the costs of the additional distress as for the amount of his execution. He must not sell the goods, or any part thereof, until after eight *clear* days following the day on which the distress is made.

(l) *Sinclair's D. C. Act, 1879, 220.*

The fees allowed by this Section are, by R. S. O., page 730, as follows :

instead of the fees allowed by this Act, the fees allowed by *The Act respecting Costs of Distress*. R. S. O. 1877, c. 47, s. 213. Rev. Stat. c. 63.

273. (m) If a replevin is made of the goods distrained, so much of the goods taken under the warrant of execution shall be sold as will satisfy the money and costs for which the warrant issued, and the costs of the sale, and the surplus of the sale and the goods so distrained, shall be returned as in other cases of distress for rent and replevin thereof. R. S. O. 1877, c. 47, s. 214. If replevin made.

274. (n) No execution creditor under this Act shall have his debt satisfied out of the proceeds of the execution and distress, or of the execution only, where the tenant replevies, until the landlord who conforms to the provisions of this Act has been paid the rent in arrear for the periods hereinbefore mentioned. R. S. O. 1877, c. 47, s. 215. When landlord's claim to rent is to be first paid.

COSTS AND CHARGES ON DISTRESS FOR SMALL RENTS AND
PENALTIES.

Levying distresses under \$80.....	\$1 00
Man keeping possession, per diem.....	0 75
Appraisement, whether by one appraiser or more—two cents in the dollar on the value of the goods;	
If any printed advertisement, not to exceed in all.....	1 00
Catalogues, sale and commission, and delivery of goods—five cents in the dollar on the net produce of the sale.	

(m) Sinclair's D. C. Act, 1879, 220, 221.

The law of Replevin will be found fully discussed in previous parts of this work and the books and authorities there referred to.

This Section is intended to preserve to the tenant his right of Replevin as against the landlord. See the above pages, note (t).

(n) Sinclair's D. C. Act, 1879, 221.

Provision is here made for protecting the landlord where the tenant replevies the goods, and where the landlord has conformed to the provisions of this Act. The right to his rent in that case is here preserved to him.

OFFENCES AND PENALTIES.

*Contempt of Court.*Contempt
of court.

275. (o) If a person wilfully insults the Judge or acting Judge or any officer of a Division Court during his sitting or attendance in court, or interrupts the proceedings of the court, any bailiff or officer of the court may, by order of the Judge, take the offender into custody, and the Judge may impose upon the offender a fine not exceeding \$20, and in default of immediate payment thereof, the Judge may by warrant under his hand and seal commit the offender to the common goal of the county for a period not exceeding one month, unless the fine and costs, with the expense attending the commitment, are sooner paid. R. S. O. 1877, c. 47, s. 217.

*Resisting Officers.*Assault-
ing
bailiff.

276. (p) If any officer or bailiff (or his deputy or assistant) be assaulted while in the execution of his duty, or if any rescue be made or attempted to be made of any property seized under a process of the court, the person so offending shall be liable to a fine not exceeding \$20, to be recovered by order of the court, or before a Justice of the Peace of the county or city, and to be imprisoned for any term not

(o) Sinclair's D. C. Act, 1879, 222, 223.

We have little to add to what is there said. In addition to the authorities cited, reference may be made to *Holman v. State*, 33 Alb. L. J., 374; 38 L. T. N. S., 593; 15 L. J. N. S., 73. See also *Martin v. Bannister*, 4 Q. B. D., 491; 2 Mews' Digest, 826-837.

(p) Sinclair's D. C. Act, 1879, 224.

It will be observed that, as originally framed, this Section made provision for criminal procedure, but in the late revision of the Statutes its language has been changed so as to bring it within the authority of the Legislature of Ontario. We submit that, as the Dominion Parliament has not specially repealed the clause of the former Act, it would be the subject of criminal jurisdiction yet.

exceeding three months, and the bailiff of the court, or any peace officer, may in any such case take the offender into custody (with or without warrant) and bring him before such court or Justice accordingly. C. S. U. C., c. 19. s. 184.

Misconduct of Clerks, Bailiffs, Etc.

277. (g) If a bailiff or officer, acting under colour or pretence of process of the court, is guilty of extortion or misconduct, or does not duly pay or account for all money levied or received by him by virtue of his office, the Judge, at a sitting of the court, if a party aggrieved thinks fit to complain to him in writing, may enquire into the matter in a summary way, and for that purpose he may summon and enforce the attendance of all necessary parties and witnesses, and may make such order thereupon for the repayment of any money extorted, or for the due payment of any money so levied or received, and for the payment of any such damages and costs to the parties aggrieved, as he thinks just; and in default of payment of the money so ordered to be paid by the bailiff or officer within the time in the order specified for the payment thereof, the Judge may, by warrant under his hand and seal, cause such sum to be levied by distress and sale of the goods of the offender, together with the reasonable charges of the distress and sale, and in default of such distress (or summarily in the first instance), may commit the offender to the common gaol of the county for a period not exceeding three months. R. S. O. 1877, c. 47, s. 218.

Misconduct of clerks and bailiffs.

(g) Sinclair's D. C. Act, 1879, 224, 225.

Extortion.

Extor-
tion.

278. (r) If a clerk, bailiff or other officer exacts or takes any fee or reward other than the fees appointed and allowed by law for or on account of anything done by virtue of his office, or on any account relative to the execution of this Act, he shall, upon proof thereof before the court, be forever incapable of being employed in a Division Court in any office of profit or emolument, and shall also be liable in damages to the party aggrieved. R. S. O. 877, c. 47, s. 219.

Negligence of Bailiffs.

If Bailiffs
neglect
their duty
in rela-
tion to
execu-
tion.

279. (s) In case a bailiff employed to levy an execution against goods and chattels, by neglect, connivance or omission, loses the opportunity of so doing, then upon complaint of the party thereby aggrieved, and upon proof of the fact alleged to the satisfaction of the court, the Judge shall order the bailiff to pay such damages as it appears the plaintiff has sustained, not exceeding the sum for which the execution issued, and the bailiff shall be liable thereto ; and upon demand made thereof and on his refusal to satisfy the same, payment shall be enforced by such means as are provided for enforcing judgments recovered in the court. R. S. O. 1877, c. 47, s. 220.

(r) Sinclair's D. C. Act, 1879, 225.

On the subject of extortion, and in addition to the cases cited at the above page, we have to refer to Arch. Crim. Pleading, 14th Ed., 702, 703 ; Roscoe's Crim. Evidence, 8th Ed., 810, *et seq.*

Should any Clerk, Bailiff or other officer be convicted under this Section, he would be incapable forever after of holding any Division Court office of profit or emolument, independently of his liability civilly for damages to the party aggrieved.

(s) Sinclair's D. C. Act, 1879, 225.

A summary power is here given to the Judge to be exercised over the Bailiff

280. (t) If a bailiff neglects to return an execution within three days after the return day thereof, or makes a false return thereto, the party who sued out the writ may maintain an action in any Court having competent jurisdiction against the bailiff and his sureties on the covenant entered into by them, and shall recover therein the amount for which the execution issued, with interest thereon from the date of judgment, or such less sum as in the opinion of the Judge or jury the plaintiff under the circumstances is justly entitled to recover. R. S. O. 1877, c. 47, s. 221.

Action
against
bailiff
and sure-
ties for
neglect of
bailiff in
returning
execu-
tion.

if he should neglect his duty in regard to an execution placed in his hands. Should damages be awarded and paid by the Bailiff under this Section, it is submitted that he could not be rendered civilly responsible otherwise.

(t) Sinclair's D. C. Act, 1879, 226.

Should a Bailiff neglect to return an execution for three days *after* the return day thereof, or make a false return of the same, the party who sued out the writ might maintain an action, in any Court having competent jurisdiction, against him and his sureties on the Covenant entered into by them. He would have the right to recover the amount for which execution issued, with interest from the date of the demand, or such less sum as in the opinion of the Judge or jury the plaintiff under the circumstances would be justly entitled to recover. As an instance of this form of action, reference may be made to the cases of *Nerlich v. Malloy*, 4 App. R., 430, and *In re Bank of Toronto*, 44 U. C. R., 247.

It would be necessary to write a treatise on the whole duties of Bailiffs and other Court officers to give the law under this head, but we only propose to refer to the works upon which the law applicable to them may be found: *Campbell on Negligence*; *Smith on Negligence*; *Wharton (U. S.) on Negligence*; *Addison on Torts*; 5 *Mews' Digest*, 684-759; *Pollock on Torts*; *Shirley's Leading Cas.*, 3rd Ed.; *Taylor on Ev.*, 8th Ed., 1727, and pages cited.

Presumably the Bailiff could, if he had been vigilant in the execution of his warrant of execution, have made the money. If there are circumstances which might shew the contrary, we think the onus of proving them is cast upon the Bailiff and his sureties: *Macrae v. Clarke*, L. R. 1 C. P., 403; *R. & J.*, 3530.

The omission to return the execution within the prescribed time would of itself be *prima facie* evidence of neglect on the part of the Bailiff.

The right to sue under this Section would not be governed by any statutory right such as is accorded to suitors on bonds given in Division Court proceedings. The jurisdiction to sue would be regulated by the law that would govern the case of any other cause of action for a similar wrong.

For the law relating to "False Return," the reader is referred to *R. & J.*, 3525-3529; 6 *Mews' Digest*, 1135-1140, 1150; *Watson on Sheriff*, 119, 297; *Taylor on Ev.*, 8th Ed., 732; *Roscoe's N. P. Ev.*, 13th Ed., 1247, *et seq.*; *Donnelly v. Hall*, 7 Ont. R., 581; *Ont. Digest*, 1887, 637.

Execution may issue in-
stantly, and if
bailiff has
removed,
his sure-
ties never-
theless
liable.

281. (u) If a judgment is obtained in the action against the bailiff and his sureties, execution shall immediately issue thereon, and in case of the departure or removal of the bailiff from the limits of the county, the action may be commenced and carried on against his sureties alone, or against any one or more of them. R. S. O. 1877, c. 47, s. 222.

FINES, HOW ENFORCED.

Fines,
how en-
forced by
Division
Courts.

282. (v) In case a Division Court imposes a fine under authority of this Act, the same may be enforced upon the order of the Judge, in like manner as a judgment for any sum adjudged therein, and shall be accounted for as herein provided. R. S. O. 1877, c. 47, s. 223.

(u) Sinclair's D. C. Act, 1879, 226.

This Section simply makes provision for proceedings by execution against a Bailiff and his sureties. It takes away from the Judge the power of postponing the issue of an execution by providing in this case that it shall "immediately issue" upon the judgment.

If the Bailiff departs or removes from the limits of the County, an action may be brought against his sureties jointly or severally for the recovery of the damages sustained, under Section 280.

Whether a Bailiff has departed or removed from the County is a question of fact to be determined as any other in the ordinary way.

(v) Sinclair's D. C. Act, 1879, 226, 227.

Power is given to the Division Court to impose fines under certain circumstances, and, as it is an extraordinary power, its exercise must be carefully guarded. As remarked in *Day v. Carr*, 7 Ex., 887, by MARTIN, B., that a power to imprison without the intervention of a jury except upon strong grounds ought not to be exercised.

But the Judge of a Division Court has no power to commit any one for contempt unless it occurred in the face of the Court: *R. v. Lefroy*, L. R., 8 Q. B., 134; *Martin v. Bannister*, 4 Q. B. D., 491.

This Section makes provision for fines imposed, whether payable for contempt or otherwise, and allows the collection of them as under an ordinary judgment. The Judge must order the imposition and enforcement of any fine unless some statutory enactment otherwise declares: See Sinclair's D. C. Act, 1879, 306, 307.

The fine must be accounted for and paid over by the Clerk of the Court to the County Crown Attorney for the County, under Section 293.

How enforced by
Jus 38
of the
Peace.

Form of conviction.

Given under hand and seal, the day and year aforesaid.

(w) Sinclair's D. C. Act, 1879, 227.

Sinclair's D. C. Act, 1880, 91.

Any contention under this and the following Section, or any other proceeding in the Division Court, in which a statutory form is given, it is sufficient to follow such form, although not strictly containing all which the Statute requires. In addition to *In re Wilson v. The Quarter Sessions of Huron and Bruce*, 23 U. C. R., 301 (cited at p. 227 of Sinclair's D. C. Act, 1879), on this point, reference may be made to the following additional authorities: *Spigener v. State*, 62 Ala., 389; 2 C. L. T., 125; *Thompson v. Farr*, 6 U. C. R., 390, *per* ROBINSON, C. J.; *Reid v. McWhinnie*, 27 U. C. R., 289; *Cornwall v. The Queen*, 33 U. C. R., 106; *R. v. Johnson*, 8 Q. B., 102; *R. v. Hickling*, 7 Q. B., 889; *Gemmill v. Garland*, 12 Ont. R., 139; *Northcoote v. Brunner*, 14 App. R., 378.

See the notes to the next previous Section.

PROTECTION OF PERSONS ACTING UNDER
WARRANTS, ETC.

Demand
of perusal
and copy
of war-
rant to be
made
before
action.

285. (y) No action shall be brought against the bailiff of a Division Court, or against any person acting by his order and in his aid, for anything done in obedience to any warrant under the hand of the clerk and seal of the court until a written demand, signed by the person intending to bring the action, of the perusal, and a copy of the warrant has by such person, his solicitor or agent, been served upon or left at the residence of the bailiff, and the perusal and copy have been neglected or refused for the space of six days after the demand. R. S. O. 1877, c. 47, s. 226.

Bailiff
entitled
to verdict
on pro-
duction
of war-
rant.

286. (z) In case, after the demand and compliance therewith by shewing the warrant to and permitting a copy thereof to be taken by the person demanding the same, an action is brought against the bailiff or other person who acted in his aid for any such cause without making the clerk of the court who signed

(y) Sinclair's D. C. Act, 1879, 227, 228.

The law casts around officers of the law who have difficult and onerous duties to perform the safeguard of a reasonable protection for anything done by them in the *bona fide* execution of their duty. This protection is not merely conferred on the officer, but to any one "acting by his order and in his aid" in the due execution of the process of the Court.

The demand of the perusal and copy of warrant here mentioned is for the purpose of giving the party who claims to be injured an opportunity of seeing that the Bailiff had the authority upon which he assumed to act. The Bailiff is protected if he acted upon a warrant which upon the face of it appeared to be good. He is not bound to enquire further or to question its regularity.

On this subject see Roscoe's N. P. Ev., 13th Ed., 1171, 1172; Chitty's Forms, 11th Ed., 48; 5 Mews' Digest, 1395; Sinclair's D. C. Act, 1879, 227, 228; Arch. Fract., 12th Ed., 1276.

(z) Sinclair's D. C. Act, 1879, 228, 229.

The Bailiff should, within the prescribed time after such demand, shew the warrant and permit a copy thereof to be taken by the person demanding the same. If he does so, and an action is brought against such Bailiff or the person acting by his order and in his aid, without making the officer of the

or sealed the warrant a defendant, then on producing or proving the warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction or other irregularity in or appearing by the warrant. R. S. O. 1877, c. 47, s. 227.

287. (a) If an action is brought jointly against the clerk and bailiff, or the person who acted in his aid, then on proof of the warrant the jury shall find for the bailiff or the person who so acted, notwithstanding such defect or irregularity as aforesaid; and if a verdict is given against the clerk, the plaintiff shall recover his costs against him, to be taxed by the proper officer in such manner as to include the costs which the plaintiff is liable to pay to the defendant for whom a verdict has been found. R. S. O. 1877, c. 47, s. 228.

If clerk and bailiff joint defendants, bailiff entitled to verdict on producing warrant, and what costs plaintiffs entitled to.

Court who signed or sealed the warrant a defendant, then, on the production or proof of such warrant at the trial, the jury will be directed to find for the defendant, notwithstanding a defect of jurisdiction or other irregularity in or appearing by the warrant.

The Bailiff should have the warrant in his possession when he acts upon it: *Galliard v. Laxton*, 2 B. & S., 363; *R. v. Chapman*, 12 Cox C. C., 4; *Codd v. Cabe*, 1 Ex. D., 352.

It is unnecessary to demand a perusal and copy of a warrant where there is no remedy against the person issuing it: *Cotton v. Kadwell*, 2 N. & M., 399.

Where a mistake is made as to the person against whom the warrant was intended, no demand of a copy and perusal need be made: *Hoye v. Bush*, 2 Scott N. R., 86.

If parties commit a pure trespass by breaking and entering a house and breaking the windows, they may be sued without a previous demand of the perusal and copy of the warrant: *Bell v. Oakley*, 3 M. & S., 259. See also 5 *Mews' Digest*, 1395, and notes to Section 285; *Ont. Digest*, 1887, 83.

(a) *Sinclair's D. C. Act*, 1879, 229.

The reader is referred to the notes to the next two preceding Sections, and especially to *Roscoe's N. P. Ev.*, 13th Ed., 1172, 1173, and *Sinclair's D. C. Act*, 1879, 223, 229.

(b) *Sinclair's D. C. Act*, 1879, 229.

The language of this Section is substantially the same as was in the 229th Section of the former Division Courts Act. The phraseology is somewhat changed, rendering it more in harmony with the Judicature Act than the language of the old Act would have been. The principles which regulated the

Defendant may plead not guilty by statute.

288. (b) In such action the defendant may plead not guilty entering a note of this Act in the margin, and in such case may thereupon avail himself of the matters of defence herein given. R. S. O. 1877, c. 47, s. 229.

GENERAL PROVISIONS WITH REGARD TO ACTIONS
FOR THINGS DONE UNDER THIS ACT.

Distress not to be deemed unlawful or persons making it trespassers by reason of defect in proceedings.

289. (c) No levy or distress for a sum of money to be levied by virtue of this Act shall be deemed unlawful, or the person making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, conviction, warrant, precept or other proceeding relating thereto, nor shall the person distraining be deemed a trespasser from the beginning, on account of any irregularity afterwards committed by him; but the person aggrieved by the irregularity may recover full satisfaction for the special damage. R. S. O. 1877, c. 47, s. 230.

Not to be trespassers *ab initio*.

290. (d) Any action or prosecution against any person for anything done in pursuance of

Limitation of actions

manner and effect of pleading the general issue by Statute must equally obtain now. As to that plea, see Roscoe's N. P. Ev., 13th Ed., 714, 1169, and the pages cited at page 1373; R. & J., 2791, 4663; Ont. Digest, 1887, 539; 5 Mews' Digest, 1333.

(c) Sinclair's D. C. Act, 1879, 229, 230.

The writer cannot say much more than he has in the pages above referred to. The object of the Legislature has been to prevent any person who acts in pursuance of or under any proceeding or process of any kind from a Division Court from being rendered liable as a trespasser therefor owing to any defect or want of form in it. The Section goes on to provide that the person distraining shall not be deemed a trespasser from the beginning on account of any irregularity afterwards committed by him, but reserves to the party aggrieved any right he may have for special damage sustained. As to being a trespasser *ab initio*, see Pollock on Torts, 319; Roscoe's N. P. Ev., 13th Ed., 865, 909; Shirley's Leading Cas., 322; Six Carpenters' Case; Addison on Torts, title "Trespass Ab Initio"; Woodfall's L. & T., last Ed.; Mayne on Damages, 3rd Ed., 375, 381.

(d) Sinclair's D. C. Act, 1879, 230, 231.

This is a Section of the Division Courts Act which requires a notice in

this Act shall be commenced within six months after the fact was committed, and shall be laid and tried in the county where the fact was committed, and notice in writing of the action and of the cause thereof shall be given to the defendant one month at least before the commencement of the action. R. S. O. 1877, c. 47, s. 231.

for things done under this Act.

291. (e) If tender of sufficient amends is made before action brought, or if the defendant, after action brought, pays a sufficient sum of money into court with costs, the plaintiff shall not recover, and in such action the defendant may plead not guilty, and give any

Defendant may tender amends and plead the general issue, etc.

writing of the action and of the cause thereof to be given to the defendant one month at least before the commencement of the action for anything done by him in pursuance of this Act. The action must also be commenced within six months after the act was committed.

The decisions upon somewhat similar Sections in regard to notice of action are so numerous that we do not attempt to give here more than a reference to the works in which these cases will be found. In our own Courts reference may be had to the following works: R. & J., 26-39, 4198-4205; Ont. Digest, 1884, 4; Ont. Digest, 1887, 5; 21 L. J. N. S., 366. In England they will be found in 1 Mews' Digest, 55-79; Chitty's Forms, 13th Ed., 45; Arch. Pract., 12th Ed., 1278-1305.

Notice of action is not necessary in Replevin: Lewis v. Teale, 32 U. C. R., 108; Applegarth v. Graham, 7 C. P. 171; Kennedy v. Hall, 7 C. P., 218; Folger v. Minton, 10 U. C. R., 423.

Absence of notice must be taken at the trial: Moran v. Palmer, 13 C. P., 450-528.

So also must the question of the *bona fides* of the defendant's conduct—as to whether he is entitled to notice of action or not.

A notice of action is not necessary in an action for an omission by a Registrar: Harrison v. Brega, 20 U. C. R., 324; Harrold v. Simcoe, 16 C. P., 43.

It is to be observed that Replevin will not lie against a pound-keeper: Ibbotson v. Henry, 8 Ont. R., 625.

If a Division Court officer should be acting outside the scope of his authority, he would not be entitled to a notice of action: *Idem*.

It will be observed that the notice shall be given one month at least before the commencement of the action. This excludes the day on which it is given.

A notice of action is a condition precedent to the right of suing: *per* FIELD, J., in Clarkson v. Musgrave, 9 Q. B. D., p. 390.

(e) Sinclair's D. C. Act, 1879, 231.

The defendant has the right to tender amends before action in suits for things done under this Act, and to plead the same. He also has the right to

special matter in evidence under that plea.
R. S. O. 1877, c. 47, s. 232. *See also* Cap. 73.

Plaintiff
not to
have
costs
where
verdict
not over
ten dol-
lars with-
out certi-
ficate.

292. (f) In case an action is brought in any Court of Record in respect of any grievances committed by any clerk, bailiff or officer of a Division Court, under colour or pretence of the process of such court, and the jury upon the trial find no greater damages for the plaintiff than \$10, the plaintiff shall not have costs unless the Judge certifies in writing that the action was fit to be brought in such Court of Record. R. S. O. 1877, c. 47, s. 233.

DISPOSAL OF FINES.

Fines,
how dis-
posed of.

293. (g) The moneys arising from any penalty, forfeiture or fine imposed by this Act,

pay a sufficient sum into Court, with costs, and if the plaintiff fails to recover more, the defendant succeeds. The defendant also may plead not guilty, and give any special matter in evidence under that plea.

On the subject of this Section generally see the pages above cited, and 7 *Mews' Digest*, 12-25; *Arch. Pract.*, 12th Ed., 1273, 1274, 1278, 1280, 1303; *Taylor on Ev.*, 8th Ed., 302, 303, 715-717; *Add. on Torts*, Chap. xii., Sec. 3; *Moore v. Hodditch*, 7 U. C. R., 207; *Sinclair's D. C. Act*, 1879, 230, 231.

(f) *Sinclair's D. C. Act*, 1879, 231.

The policy of the law is to discourage actions against public officers for anything done by them in the honest discharge of their duty. It is by this Section provided that if any action is brought in any Court of Record in respect of any grievances committed by any Division Court Clerk, Bailiff, or other officer of that Court, under colour or pretence of the process of such Court, and the jury (or the Judge, if it is submitted, if tried without a jury) find no greater damages for the plaintiff than \$10.00, he shall not have costs unless the Judge certifies in writing that the action was fit to be brought in such Court of Record.

It will therefore be seen that it is better in the public interest for parties to suffer a small damage without actual redress than that Division Court officers should perform their duty at the risk of an action for every slight default. The Judge has, however, a discretion in the case, and if, in his opinion, it is an action fit to be brought in such Court of Record, he can certify in writing therefor.

There may be a difference of opinion as to what is a "fit" action to be brought in a Court of Record. We submit that it means a cause of action in which the jury may think proper to give not more than \$10.00 damages, but where the evidence would have warranted them in giving a larger sum, and for which the plaintiff reasonably made claim. The rule which governed in regard to certifying for costs should, we think, be observed here.

(g) *Sinclair's D. C. Act*, 1879, 231, 232.

Should any special provision be made for the disposition of any penalty.

not directed to be otherwise applied, shall be paid to the clerk of the court which imposed the same, and shall be paid by him to the County Crown Attorney of the county to be by him paid over to the Provincial Treasurer, and shall form part of the Consolidated Revenue Fund. R. S. O. 1877, c. 47, s. 234.

DISPOSAL OF MONEYS PAID INTO COURT.

294. (h) The Clerk of every Division Court shall, immediately after the receipt of any sum of money whatever for any party to an action, forward, through the post office, to the party entitled to receive the same, a notice, enclosed in an envelope addressed to such party or in the case of a transcript of judgment from another court, then to the clerk who issued the same, at his proper post office address, informing him of the receipt of the money; the

Clerk to
mail no-
tice of
payment
of money.

forfeiture or fine under this Act, this Section would have no application. It is intended to apply to any moneys that might arise under such Sections as the 133rd, 162nd, 165th and 275th of this Act. The moneys ultimately become part of The Consolidated Revenue Fund of the Province.

(h) Sinclair's D. C. Act, 1880, 88-90.

The words "shall immediately" here used, denote both an imperative and peremptory command. They imply "prompt, vigorous action, without any delay."

It will be observed that the words here employed are "*any* sum of money whatever." Whether the sum be large or small, the notice is required to be given by the Clerk. The party entitled to the notice could, of course, waive the giving of it; but, in order to justify a Clerk in omitting to give it, he should, for his own protection, take the waiver *in writing*. Should the Inspector find that such notice had not been given in any case where not dispensed with, he would probably reprimand the officer, and if such practices became general, it would be his duty to report such conduct to the Government, under Section 61 of this Act, for their action upon it.

The remissness of many Clerks throughout the country has rendered this and many other provisions of the present Act necessary. The omission on the part of some Clerks to advise parties when moneys paid into Court on their suits was under the law formerly a frequent source of trouble and complaint. Should the provisions of this Section be disregarded, the Executive has, under Section 80, the power to exercise a summary remedy.

No particular form of notice is necessary, provided it gives to the person

notice thus sent shall be prepaid and registered, and the clerk shall obtain, and file among the papers in the action the post office certificate of the registration, and shall deduct the postage and charge for registration from the moneys in his hands, but he shall charge no fee for the notice; the absence from among the papers in the action of the certificate of registration shall be *prima facie* evidence against the clerk that the notice has not been forwarded. 43 V. c. 8, s. 56.

Unclaimed moneys to be paid over to County Crown Attorney.

295. (i) All sums of money which have been paid into court to the use of any party, and which have remained unclaimed for the period of six years after the same were paid

entitled to it the necessary information. It may be in the following form, or to the like effect:

In the Division Court for the County of
A. B., Plaintiff, v. C. D., Defendant.
Take notice that the sum of \$ has this day been paid into
Court to your credit in this cause.
Dated this day of 188 Clerk.

To A. B., the Plaintiff (or as the case may be).

[We would suggest the propriety of Clerks keeping a supply of blank notices on hand.]

The Clerk should, under Rule 125, obtain the address of the parties to a suit so that he may know where to send this notice to.

The provision in respect to transcripts of judgment appears to be one of the most salutary provisions of the Act. The neglect hitherto of some Clerks to make returns, not only of the money they received but to the transcripts themselves, has brought discredit, and in many cases disgrace, on the Division Court system. It is to be hoped that a stop will now be put to practices that had become disreputable, and which had in many cases been indulged in with impunity.

It may appear to the Clerk an unnecessary requirement of the law that this notice should be given by registered letter. It must, however, be done, and the omission to conform strictly to the law in this respect might get the Clerk into trouble. Creditors will, no doubt, gladly pay the small charges for the advantage of being advised of their money being paid into Court.

As the absence of this certificate has been by the Legislature made *prima facie* evidence of the omission to give the notice, it is to be hoped that every Clerk will, for his own interest as well as those of the suitor, make sure to have the certificate among the papers.

(i) Sinclair's D. C. Act, 1879, 232.

This Section must be read in connection with Section 49 *hereio*.

into court or to the officers thereof, and all sums of money when this Act takes effect or afterwards in the hands of the clerk or bailiff, paid into court, or to the officers thereof, to the use of any suitor shall, if unclaimed for the period of six years after the same were so paid, form part of the Consolidated Revenue Fund, and be paid over by the clerk or officer holding the same to the County Crown Attorney of his county, to be by him paid over to the Treasurer of the Province, and no person shall be entitled to claim any sum which has remained unclaimed for six years. R. S. O. 1877, c. 47, s. 235.

296. (j) No time during which the person entitled to claim such sum was an infant or of unsound mind, or out of the Province, shall be taken into account in estimating the six years. R. S. O. 1877, c. 47, s. 236.

Claims of persons under disability not to be prejudiced.

If any money should be unclaimed at and for the period of six years after the same were paid into Court or to the officers thereof, this Section would operate in such way as to prevent its recovery. It is virtually a Statute of Limitation upon the rights of the party to whose use the money was paid in. But we submit that the forfeiture here declared can only come into operation where the party entitled has either notice of it under the next preceding Section or otherwise. It might be that a Clerk would fail to give notice of the money having been paid in, or he might deny that he received it, so that we think, under these circumstances, it would not be "unclaimed" money within the meaning of this Section: *Gibbs v. Guild*, 9 Q. B. D., 59. We cannot see that the wrong of another should operate as a confiscation of the property of an innocent party: See *Atty.-Gen. v. O'Reilly*, 6 App. R., 576.

When the money becomes forfeited it forms part of the Consolidated Revenue Fund of the Province.

The six years would, in the view which the writer takes of this Section, only commence to run when the party entitled knew that it was in Court for him. It then, we repeat, could only be considered as having "remained unclaimed for six years" within the latter part of the Section barring the remedy therefor after six years from such knowledge.

(j) *Sinclair's D. C. Act*, 1879, 232.

There are three cases in which Section 295 shall not apply:

- (1) Where the party entitled was an infant; or
- (2) Was of unsound mind; or
- (3) Was out of the Province,

during the six years.

If during the six years any of these contingencies happened, the time would

GENERAL RULES AND ORDERS.

Board of
Judges
and their
authority
to frame
rules con-
tinued.

297. (k) The existing Board of County Judges with authority to make rules relating to Division Courts shall continue until superseded or revoked by the Lieutenant-Governor; and all Rules and Forms heretofore made relating to Division Courts and in force when this Act takes effect shall, so far as applicable, remain in force until otherwise ordered under the provisions of this Act. R. S. O. 1877, c. 47, s. 237.

The Lieuten-
ant-Governor
may ap-
point five
County
Judges to
frame
rules, etc.

298. (l) (1) The Lieutenant-Governor may from time to time appoint and authorize five of the County Judges, who shall be styled "The Board of County Judges," to frame General Rules and Forms concerning the

be suspended during the disability, or, in other words, deducted from the six years.

We do not think this Section can be construed in the light of the Statute of Limitations—as to which see 4 Mews' Digest, 1882-1928; Banning on the Statute of Limitations.

(k) Sinclair's D. C. Act, 1879, 232.

The Board of Judges in existence at the time this Act came into force shall continue until their authority as such shall be superseded or revoked by the Lieutenant-Governor.

The Rules and Forms which have hitherto been made relating to Division Courts, and in force at the time this Act came in force, shall also continue. These are the Statutory Rules and Forms, to be found at pages 236-335 of Sinclair's D. C. Act, 1879. Whether or not these Rules and Forms are consistent with the Statutes upon which they are respectively founded may be questioned. But whether they are or not, they have all the force of Statutory law by Section 301: See page 292 hereto.

Such Rules and Forms were framed before the many changes in the law were made, and to some extent they have been virtually repealed by subsequent legislation, and refer to Statutes which have twice since been consolidated or are repealed. The reader must adapt them as best he can to the corresponding Sections of the present Act. No complete Rules and Forms can properly be promulgated until the present ones are entirely re-framed, re-cast and adopted.

(l) Sinclair's D. C. Act, 1879, 233.

The power of appointment having been conferred by the Imperial B. N. A. Act on the Lieutenant-Governor, "The Board of County Judges" appointed have power to frame General Rules and Forms for the execution of the process of Division Courts, with power to alter same or change them as may be required. If doubts arise, as they frequently do by conflicting decisions, in the

practice and proceedings of the Division Courts, and the execution of the process of such courts, with power also to frame rules and orders in relation to the provisions of this Act, or of any future Act respecting such courts, as to which doubts have arisen or may arise, or as to which there have been or may be conflicting decisions in any of such courts.

(2) The Lieutenant-Governor may appoint any retired County Judge to be one of the members of the Board.

Retired Judge may be appointed

(3) The Board may also from time to time make Rules for the guidance of clerks and bailiffs, and in relation to the duties and services to be performed, and to the fees to be received by them; and may also substitute other fees in lieu of fees payable to clerks and bailiffs under any rule, order or statute.

Rules respecting Clerks and Bailiffs.

(4) The Board may from time to time alter or amend any rules or orders made for the Division Courts, and may for any Division Court Division, embracing a city or a part of a city, establish a lower tariff of fees from that established for County Division Courts.

Amendment of rules

R. S. O. 1877, c. 47, s. 238.

Division Courts, power is also here given to the Board of Judges to remove the same by Rules or Orders.

The Lieutenant-Governor may appoint any retired County Judge to be one of the members of the Board. We think it advisable to keep the judicial and legislative functions of Government distinct, and if a retired County Judge chooses to become a legislator in our Dominion Parliament, the writer thinks he ceases to become a "retired County Judge" within the spirit of our law. See Story on the Amer. Con., C. S. C., Chap. 138, Secs. 14 and 15; B. N. A. Act, ss. 17-101.

The Board may also make Rules for the guidance of Clerks and Bailiffs in regard to their duties and the fees to be received by them. No other authority has under the law power to regulate the fees of such officers except the said Board of County Court Judges.

As will be observed power is here given to the said Board to alter or amend the Rules or Orders made for the Division Courts. The Board has also power, in the case of a Division Court embracing a city or part of a city, to establish a

Board to
certify
rules to
the High
Court to
be laid
before the
Judges.

299. (m) The Board of County Judges or any three of them shall, under their hands, certify to the President of the High Court all Rules and Forms made after this Act takes effect, and the said President shall submit the same to the Judges of the High Court, or to any four of them. R. S. O., 1877, c. 47, s. 239.

Such rules
to be ap-
proved of
by the
Judges;

300. (n) The Judges of the High Court (of whom the President of one of the Divisions shall be one) may approve of, disallow, or amend any such Rules or Forms. R. S. O. 1877, c. 47, s. 240.

And have
force of a
statute.

301. (o) The Rules and Forms so approved of shall have the same force and effect as if they had been made and included in this Act. R. S. O. 1877, c. 47, s. 241.

Judges to
transmit
copies to

302. (p) The Judges who make any Rules and Forms approved of as aforesaid shall for-

lower tariff than is allowed in other Courts. If the emoluments of any office should be too large consistently with the duties of the Clerk, power is here given to reduce them.

(m) Sinclair's D. C. Act, 1879, 233.

The Board of County Judges, or any three of them, are required to certify to the President of the High Court of Justice all Rules and Forms made after the Division Courts Act takes effect, and the same shall be submitted to the Judges of the High Court, or to any four of them. The work of the Board of County Court Judges shall have no effect unless approved of under Section 301 hereof. Consolidation of the Division Court Act does not affect the Statute or Rules: License Commissioners of Frontenac *v.* Frontenac, 14 Ont. R., 741.

(n) Sinclair's D. C. Act, 1879, 233.

The Judges of the High Court (of whom the President of one of the Divisions shall be one) may approve of, disallow or amend any Rules or Forms framed by the Board of County Court Judges. They have no force until approved of by the Judges of the High Court.

(o) Sinclair's D. C. Act, 1879, 234.

When the Rules and Forms have been framed by the Board of County Court Judges and approved of under Section 300, they shall have all the force of Statutory enactment. The Legislature has power to confer on others this power: *Hodge v. The Queen*, 9 App. Cas., 117; *Powell v. Apollo Candle Co.*, 10 App. Cas., 282.

(p) Sinclair's D. C. Act, 1879, 234.

It would seem to be the duty of the Board of County Judges when they

ward copies thereof to the Lieutenant-Governor, and the Lieutenant-Governor shall lay the same before the Legislative Assembly. R. S. O. 1877, c. 47, s. 242.

the Lt.-Governor, etc.

303. (q) The Lieutenant-Governor may, by warrant, direct the Provincial Treasurer to pay, out of the Consolidated Revenue Fund, the contingent expenses connected with the framing, approval and printing of such Rules. R. S. O. 1877, c. 47, s. 243.

Expenses provided for.

304. (r) In any case not expressly provided for by this Act or by existing Rules, or by Rules made under this Act, the County Judges may, in their discretion, adopt and apply the general principles of practice in the High Court to actions and proceedings in the Division Courts; provided that nothing herein contained shall be held to authorize the taxation or allowance of costs to any officer of the court, other than those to be found in the tariff of fees as authorized and allowed by the Board of County Judges, under the provisions of this or any other Act. R. S. O. 1877, c. 47, s. 244; 45 V. c. 7, s. 7.

Practice of the High Court may be followed in unprovided cases.

receive the approval of any Rules or Forms from the Judges of the High Court to forward the same to the Lieutenant-Governor, as this Section prescribes. It is also declared to be the duty of the Lieutenant-Governor to lay the same before the Legislative Assembly. The latter body does not require to do anything to give legal effect to them, nor can it prevent their immediate operation except by Statute.

(q) Sinclair's D. C. Act, 1879, 234.

This Section provides for the payment of the expenses connected with the framing, approval and printing of any Rules that may be framed or adopted.

(r) Sinclair's D. C. Act, 1879, 234; D. C. Law, 1884, 86, 87.

The writer has been unable to find any decision upon the language here used except the cases of *Bellamy v. Hoyle*, L.R., 10 Ex., 220, in which it was held that the general principles of practice of the High Court applied to a case of necessity in carrying out the edicts of the Court, and that this inherent power belonged to all Courts of Justice; and in *Clarke v. Macdonald*, 4 Ont. R., at page 315, where the present Chief Justice of the Queen's Bench Division says: "It is only in cases not expressly provided for by the Division Courts Act and Rules that the County Court Judges may in their discretion adopt and apply the general principles of practice in the Superior Courts of Common Law to actions and proceedings in the Division Courts." See also *Bank of Ottawa v. McLaughlin*, 8 App. R., 543; *In re Willing v. Elliott*, R. & J., 1106.

SCHEDULE (s)

(Section 35.)

COVENANT BY CLERK OR BAILIFF.

Know all men by these presents, that we *J. B.*, Clerk (*or Bailiff as the case may be*) of the _____ Division Court, in the County _____ (*or United Counties*) of _____ *S. S.*, of _____, in the said County of _____ (*Esquire*), and *r. M.*, of _____,

in the said County of _____ (*Gentleman*), do hereby jointly and severally for ourselves, and for each of our heirs, executors and administrators, covenant and promise that *J. B.*, Clerk (*or Bailiff*), of the said Division Court shall duly pay over to such person or persons entitled to the same, all such moneys as he shall receive by virtue of the said office of Clerk (*or Bailiff*) and shall and will well and faithfully do and perform the duties imposed upon him as such Clerk (*or Bailiff*) by law, and shall not misconduct himself in the said office to the damage of any person being a party in any legal proceeding; nevertheless, it is hereby declared that no greater sum shall be recovered under this covenant against the several parties hereto than as follows, that is to say:

Against the said <i>J. B.</i> in the whole,	— dollars.
Against the said <i>S. S.</i>	— dollars.
Against the said <i>P. M.</i>	— dollars.

In witness whereof, we have to these presents set our hands and seals, this _____ day of _____, in the year of Our Lord one thousand eight hundred and _____

Signed, sealed and delivered, }
in the presence of }

R. S. O. 1877, c. 47, Sched.

(s) For the extent of a Surety's liability under this Covenant, the reader is referred to pages 15-17 of this work.

The General Rules and Statutory Forms in force in the Division Courts of the Province will be found in Sinclair's D. C. Act, 1879, 236-336.

They have been framed for many years and were made and adopted when the Division Courts Act was a very different Statute to what it is at the present day. Many of the Rules apply to Sections of the Act which have been repealed and re-enacted in another form ; many to Sections which are very much changed or have ceased to be known as given in the Rules of Court. A great necessity exists for there being a complete revision of Rules and Forms, a recast of the same made, and a complete consolidation of the whole, together with a greater assimilation thereof to the practice of the High Court of Justice.

Until this is done—which it must ere long—it would be a useless task to print them in their present form.

When reference is required to be made to them, the writer's work of 1879, at the pages referred to, will give all necessary information.

It would, also, have increased the expense of this work to have printed the Rules and Forms as they are—in their imperfect state—without adding a corresponding advantage to the public.

The Forms which will be found *post* are not authoritative, but have been framed and published by the writer as some guide to the form of proceedings to be adopted in Division Court practice, and not to be found elsewhere than in the works of the writer.

FORMS.

[Copyright.]

(1.) AFFIDAVIT OF SERVICE OF SUMMONS ON AN ABSCONDING
DEBTOR BY LEAVING COPY, ETC., WITH PERSON DWELL-
ING AT HIS LAST PLACE OF ABODE.

[See pp. 265, 266, ante.]

(Court and Cause.)

I, A. B., of the of , in the County of , Bailiff of the
above mentioned Court (or as the case may be), make oath and say :

1. That I did on the day of A. D. 188 , serve (naming him),
the above named defendant in this cause with the within (or "annexed")
summons, notices and warnings therein and the particulars of claim therewith
in this cause, by delivering a true copy of each to and leaving them with
(naming the person), at the last place of abode in this Province of the above
named defendant, and that at the time of such service the said (naming the
person to whom papers delivered) was dwelling at the defendant's said last place
of abode, and that I necessarily travelled miles to make such service.

Sworn, etc.

(2.) AFFIDAVIT OF SERVICE OF SUMMONS ON AN ABSCONDING
DEBTOR BY LEAVING COPY, ETC., AT LAST PLACE OF
ABODE OR DWELLING OF DEBTOR, NO PERSON BEING
THERE FOUND.

[See pp. 265, 266, ante.]

(Court and Cause.)

I, A. B., of the of , in the County of , Bailiff of the
above mentioned Court (or as the case may be), make oath and say :

1. That I did on the day of A. D. 188 , serve (naming him),
the above named defendant in this cause, with the within (or "annexed")
summons, notices and warnings therein, and the particulars of claim therewith
in this cause, by delivering a true copy of each to and leaving them at the last
place of abode and dwelling of the defendant in this Province, and at the time
of so leaving them there no person could be there found, and that I necessarily
travelled miles to make such service.

Sworn, etc.

(3.) AFFIDAVIT OF SERVICE OF SUMMONS ON AN ABSCONDING DEBTOR BY LEAVING COPY, ETC., AT HIS LAST PLACE OF TRADE OR DEALING.

[See pp. 265, 266, ante.]

(Court and Cause.)

I A. B., of the of , in the County of , Bailiff of the above mentioned Court (or as the case may be), make oath and say:

1. That I did on the day of A. D. 188 , serve (naming him), the above named defendant in this cause, with the within (or "annexed") summons, notices and warnings therein, and the particulars of claim therewith in this cause, by delivering a true copy of each to and leaving them with (naming the person), at the last place of trade and dealing of the above named defendant in this Province, and that at the time of such service the said (naming the person served) was dwelling at the defendant's said last place of trade and dealing, and that I necessarily travelled miles to make such service.

Sworn, etc.

(4.) ADJUDICATION ON INTERPLEADER WHERE DAMAGES CLAIMED AND AWARDED UNDER SECTION 269, SUB-SECTION (3.)

[See pp. 270, 273, ante.]

Adjudged, that the goods [or, the goods, chattels and moneys, or proceeds of the goods, etc. (as the case may be),] mentioned in the (within interpleader summons [if only for a part of the goods, etc., add the words, "hereinafter mentioned, that is to say," (here enumerate them)] are the property of E. F. (the claimant).

It is also adjudged that the said E. F. (the claimant) has sustained damages arising, or capable of arising, out of the execution of the process by which said goods (or as the case may be) were taken in execution (or attached) to the amount of \$ and that the same is recoverable from and payable by A. B. (the execution creditor, or L. M., the Bailiff); to the said E. F. (the claimant), and which said sum is hereby ordered to be paid forthwith (or as the case may be).

It is further ordered that the costs of the said interpleader proceeding and of the said claim for damages be paid by (here insert such order as the Judge may have made as to costs in each of these two proceedings), in days.

(5.) ADJUDICATION ON INTERPLEADER WHERE DAMAGES CLAIMED UNDER SECTION 269, SUB-SECTION (3), AND DISALLOWED.

[See pp. 270, 273, ante.]

Adjudged, that the goods [or, the goods, chattels and moneys, or proceeds of the goods, etc. (as the case may be),] mentioned in the (within) interpleader summons [if only for a part of the goods, etc., add the words, "hereinafter mentioned, that is to say," (here enumerate them) are the property of E. F. (the claimant)].

It is also adjudged that the said E. F. (the claimant,) has not sustained any damages arising, or capable of arising, out of the execution of the process by which said goods (or as the case may be) were taken in execution (or attached).

It is further ordered that the costs of the said interpleader proceeding and of the claim for damages be paid by (here insert such order as the Judge may have made as to costs in each of these two proceedings), in days.

(6.) AFFIDAVIT OF JUSTIFICATION OF SURETY ON APPEAL FROM DIVISION COURT.

[See p. 176 ante, and R. S. O. 511-514.]

In the Division Court for the County of .

Between A. B., Plaintiff, and C. D., Defendant.

I, E. F., of, &c., one of the sureties for the above-named plaintiff (or "defendant") in this cause, in the annexed appeal-bond, make oath and say :

That I am a householder (or "freeholder" as the case may be), residing at (give particular description of the place of residence) ; that I am worth property to the amount of dollars ("the amount of the penalty of the bond," Rev. Stat. cap. 47, s. 48), over and above what will pay all my just debts (if bail or security in any other action add, "and every other sum for which I am now bail or security") ; that I am not bail or security for any plaintiff or defendant except in this action (or, if bail or security in any other action or actions, add), except for C. D., at the suit of E. F., in the Court of in the sum of \$; for G. H., at the suit of J. K., in the Court of in the sum of \$ (specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail or security).

Sworn, &c.

[See County Court Rule 84, and the form of affidavit of justification of bail there given. The affidavit of the other surety will be the same, excepting name, &c., as the above.]

(7.) AFFIDAVIT OF JUSTIFICATION OF SURETY TO APPEAL BOND
ON APPEAL FROM COUNTY COURT.

[See p. 176 ante, and R. S. O. 511-514.]

In the County Court of the County of

A. B., Plaintiff,

AGAINST

C. D., Defendant.

I, E. F., of, &c., one of the sureties for A. B., within named, the above-named plaintiff (or "for C. D., within named, the above-named defendant,") in this cause, on the annexed appeal bond, make oath and say:

That I am a householder, (or "freeholder," as the case may be,) residing at (give particular description of the place of residence); that I am worth property to the amount of dollars ("the amount of the penalty of the bond," Rev. Stat. cap. 47, s. 48), over and above what will pay all my just debts (if bail or security in any other action add, and every other sum for which I am now bail or security); that I am not bail or security for any plaintiff or defendant except in this action (or, if bail or security in any other action or actions, add), except for C. D., at the suit of E. F., in the Court of in the sum of \$, for G. H., at the suit of J. K., in the Court of in the sum of \$, (specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail or security).

Sworn, &c.

[See County Court Rule 84, and the form of affidavit of justification there given. The affidavit of the other surety will be the same *mutatis mutandis*.]

(8.) AFFIDAVIT OF JUSTIFICATION BY SURETIES TO APPEAL
BOND ON APPEAL FROM DIVISION COURT.

[See p. 176, and R. S. O. 511-514.]

(Court and Cause.)

I, G. H., of, etc., one of the sureties for A. B. (or E. F. as the case may be) in the annexed appeal bond, make oath and say:

That I am a householder and housekeeper (or "freeholder," as the case may be), residing at (give particular description of the place of residence). That I am worth property to the amount of dollars ("the amount of the penalty of the bond," Rev. Stat. cap. 47, section 48) over and above what will pay all my just debts. (If bail or security in any other action, add, "and every other sum for which I am now bail or security.")

That I am not bail or security for any plaintiff or defendant, except in this action (or if bail or security in any other action or actions, add), except for A. S. at the suit of D. E., in the Court of , in the sum of \$;

for B. M. at the suit of S. T., in the Court of _____, in the sum of \$ _____
(Specifying the several actions, with the Courts in which they are brought, and the sum in which the deponent is bail or security.)

Sworn, etc.

[See County Court Rule 84, and Har. C. L. P. Act, page 664, and the Form of Affidavit of Justification of Bail there given. The affidavit of the other surety will be the same, excepting the name, etc., as the foregoing Form.]

(9.) AFFIDAVIT OF EXECUTION OF APPEAL BOND ON APPEAL FROM DIVISION COURT.

[See p. 176 ante, and R. S. O. 513.]

In the _____ Division Court for the County of _____.

Between A. B., Plaintiff, and C. D., Defendant.

I, J. K., of, &c., make oath and say :

1. That I was personally present, and did see the annexed appeal bond duly signed, sealed and executed by A. B. (or C. D.), E. F. and G. H., the obligors therein mentioned.

2. That I am personally acquainted with the said parties.

3. That I am a subscribing witness to the execution of the said appeal bond by all of the said parties ; and the signature "J. K." affixed thereto in attestation of such execution is in my own proper handwriting ; and that such bond was so executed at, &c.

Sworn, &c.

(10.) AFFIDAVIT OF EXECUTION OF APPEAL BOND ON APPEAL FROM COUNTY COURT.

[See p. 176 ante, R. S. O. 513.]

In the County Court of the County of _____.

A. B., Plaintiff,

AGAINST

C. D., Defendant.

I, J. K., of, &c., make oath and say :

1. That I was personally present and did see the annexed appeal bond duly signed, sealed and executed by A. B. (or C. D.), E. F. and G. H., the obligors therein mentioned.

2. That I am personally acquainted with the said parties.

3. That I am a subscribing witness to the execution of the said appeal bond by all of the said parties ; and that the signature "J. K." affixed thereto, in attestation of such execution, is in my own proper handwriting ; and that such bond was so executed at, &c.

Sworn, &c.

(11.) AFFIDAVIT OF EXECUTION OF APPEAL BOND ON APPEAL FROM DIVISION COURT.

[See p. 176 ante, and R. S. O. 513.]

(Court and Cause.)

I, L. M., of, etc., make oath and say :

1. That I was personally present and did see the annexed appeal bond duly signed, sealed and executed by A. B. (or E. F.), G. H. and J. K., the obligors therein mentioned.

2. That I am personally acquainted with the said parties.

3. That I am a subscribing witness to the execution of the said appeal bond by all of the said parties ; and that the signature " L. M." affixed thereto in attestation of such execution is in my own proper handwriting ; and that such bond was so executed at, etc.

Sworn, etc.

[Notice of application for the approval of the bond should be given to the opposite party, as pointed out at page 50 of Sinclair's D. C. Act, 1880, and it should be seen that the bond is duly approved of by the Judge, and other necessary proceedings taken as pointed out in the work just referred to at page 51 and following pages.]

(12.) AFFIDAVIT FOR CERTIORARI.

[See p. 123 ante.]

(Court, no Cause.)

I, A. B., of the of , in the County of , in the Province of Ontario, make oath and say :

1. That on the day of last past, I was served with a summons and particulars of claim thereto attached (or "indorsed"), in a suit entered in the Division Court for the (said) county of , in which suit is plaintiff, and A. B. is defendant.

2. That the annexed papers, marked respectively "A" and "B," are true copies (or "the copies"), of the said summons and particulars of claim so served on me.

3. That I am the said A. B. mentioned and described as the defendant in the said suit in the said Division Court, and in the said summons so served on me as aforesaid.

4. That this action is brought against me for the purpose of recovering the

sum of dollars for (*here set out particularly the cause of action sued for; if the particulars of claim attached to or indorsed on the summons do not do so.*)

5. That I am advised, and verily believe, that several difficult questions of law are likely to arise on the hearing of the said cause, and among others the following (*here state distinctly and fully the questions of law likely to arise; also state in the affidavit all facts tending to show that such questions are likely to arise.*)

6. That I have been advised, and verily believe, that I have a good defence to the said action so brought against me on the merits

7. That the application for writ of *certiorari* to be made herein, is not made for the purpose of delaying the fair or speedy trial of the said action, or in any way to prejudice or delay the said in the prosecution of any cause of action he may have against me in any suit, nor in the recovery of any sum of money he may be found entitled to in the said suit; that the said application will be made *bona fide*, and for the sole purpose of the better determining my liability on the said alleged cause of action, and with no other object or purpose *never*.

Sworn, &c.

(13.) AFFIDAVIT FOR COMMISSION TO EXAMINE WITNESSES.

[*See p. 168 ante.*]

In the County Court of the County of .

In a cause in the Divi- I, A. B., of, &c., the above named plaintiff,
sion Court for the County of herein make oath and say:
in which A. B. is plain- 1. That this action is brought for the recovery
tiff, and C. D. is defendant. of (*here state shortly the cause of action.*)

2. That the defendant has filed a disputing notice herein.

3. That E. F. is a material and necessary witness for me in the said cause, and I am advised, and verily believe, that I cannot safely proceed to the trial of it without his evidence.

4. That the said E. F. is at present residing at , without the limits of the Province of Ontario. (*If made by the defendant, add the following:*)

5. That I have a good defence to this action on the merits, as I am advised and verily believe (*or, if made by the Solicitor or his Clerk, say, "the defendant has, as I am instructed and verily believe, a good defence," &c.*)

6. This application for a commission is made *bona fide* for the purpose of procuring the evidence of the said , and not for delay.

Sworn, &c.

(14.) AFFIDAVIT FOR ORDER TO EXAMINE A SICK, AGED OR INFIRM WITNESS.

[See pp. 169-171, ante.]

In the Division Court of the County of

Between A— B—, Plaintiff,

AND

C— D—, Defendant.

I, _____, of, &c., the above named plaintiff (or defendant) in this cause, make oath and say:

1. This action is brought for (*here state concisely the cause of action sued for*).

2. The summons herein was served on or about the _____ day of _____ A. D. 18____, and this action can be heard at the sittings of the Court which will be held on the _____ day of _____ next (or "instant").

3. The defendant has (*or if the defendant makes the affidavit, "I have"*) filed a notice disputing the plaintiff's claim herein.

4. That E. F., of, &c. (*a person residing within the Province*) is a material and necessary witness on my behalf as I am advised and verily believe, and I cannot safely proceed to the trial hereof without his evidence, and that the materiality of his evidence consists in this (*here in a general way describe it*).

5. That said E. F. is sick, being dangerously ill with (*here describe disease*) and not expected to recover (*or as the case may be*), or that he is "aged," or "infirm," being now _____ years of age, or "that he is about to leave the Province" (*as the case may be*), and that his attendance at Court as a witness cannot by reason thereof be procured.

6. I am advised and believe that I have a good cause of action (or defence) herein on the merits, and that this application is made *bona fide* and not for the purpose of delay.

Sworn, &c.

[The affidavit should clearly shew that the person proposed to be examined is weak, aged, or infirm, or about to leave the Province, and that his attendance at Court as a witness cannot by reason thereof be procured. If possible this should not be left to a general statement merely, but facts and circumstances should be given. If founded on sickness of the witness, an affidavit by or a verified certificate of the medical attendant should form part of the application, the former being preferable. The affidavit had better be made by the applicant, his solicitor, or agent. As a general rule the materiality of the proposed evidence need not be given as appears in the 4th paragraph, but if the application is likely to be opposed, or there is anything exceptional in the circumstances, it had better be stated with particularity.]

(15.) AFFIDAVIT OF SERVICE OF GARNISHEE SUMMONS *BEFORE* JUDGMENT ON THE AGENT OF A BODY CORPORATE THAT HAS ITS CHIEF PLACE OF BUSINESS OUT OF THE PROVINCE.

[See p. 209 ante.]

(Court and Cause.)

I, E. F. of, etc., Bailiff of the Division Court of the County of
(or "of the above mentioned Court"), make oath and say :

1. That I did on the day of 188 , duly serve one G. H. with a true copy of the within (or "annexed,") summons, notices, memorandum and warnings therein and thereon, and of the particulars of claim therewith in this cause, by delivering the same personally to the said G. H.

2. That at the time of such service the said G. H. was the agent of the above named garnishees at (*name of place*), and that at the said time he as such agent, had an office at (*name of place*), and that I necessarily travelled miles to make such service.

Sworn, etc.

(16.) AFFIDAVIT OF SERVICE OF GARNISHEE SUMMONS *AFTER* JUDGMENT ON THE AGENT OF A BODY CORPORATE THAT HAS ITS CHIEF PLACE OF BUSINESS OUT OF THE PROVINCE.

[See p. 206 ante.]

(Court and Cause.)

I, E. F. of, etc., Bailiff of the Division Court, of the County of ,
(or "of the above mentioned Court,") make oath and say :

1. That I did on the day of 188 , duly serve one G. H. with a true copy of the within (or "annexed") summons, notices, memorandum or warnings therein and thereon, in this cause, by delivering the same personally to the said G. H.

2. That at the time of such service the said G. H. was the agent of the above named garnishees at (*name of place*), and that at the said time he, as such agent, had an office at (*name of place*), that such office was at the time of said service within the division of the Division Court, of the County of , and that I necessarily travelled miles to make such service.

Sworn, &c.

[If the office of the agent is not within the division in which judgment was recovered, the Affidavit should shew particularly where it is, so that the Judge might determine whether the office "is nearest thereto."]

(17.) AFFIDAVIT FOR IMMEDIATE JUDGMENT.

[See pp. 152-154, ante.]

In the Division Court for the County of .

Between A. B., *Plaintiff*,

AND

C. D., *Defendant*.

I, A. B., of the of , in the County of , and Province of Ontario, make oath and say :

1. That I am the above named plaintiff (or "one of the above named plaintiffs") in this cause.

2. That this action was commenced on or about the day of A. D. 18 , by a special summons duly issued out of this Court, in pursuance of the 109th Section of the Division Courts Act, for the sum of \$.

3. That the annexed paper marked "A" is a true copy of the particulars of the plaintiff's claim or demand in said action. (Or, "That the following is a true copy of the particulars of the plaintiff's claim or demand in said action," giving in either case the particulars verbatim.)

4. That I verily believe said summons, together with a true copy of said particulars of claim or demand, and all notices and warnings required to be given, were duly served on the defendant in this cause.

5. That subsequent to said service the defendant left with the Clerk of this Court a notice in writing to the effect that he disputed the claim sued for herein.

6. That the defendant at the commencement of this action was and still is truly and justly indebted to me in the sum of \$ in respect of the matters in the said particulars of claim or demand mentioned.

7. (*Here state as concisely as is consistent with clearness the facts upon which the plaintiff's claim is founded. Mere matters of evidence need not necessarily be stated, but a good cause of action must be disclosed, and the plaintiff's claim in respect of it verified, and in some cases it may be advisable to state the evidence by which it is supported. The form of affidavit must necessarily vary according to the facts of each particular case. The statement of facts may be confined to one paragraph, or divided into several, as may be found most convenient. Each paragraph should contain as far as possible a separate allegation of fact. The affidavit should be made as strong as possible, and any facts tending to shew an admission of the claim by the defendant should be distinctly stated.*)

8. In my belief there is no defence to this action, and that the notice in writing left by the defendant with the Clerk of this Court, that he disputed the claim sued for herein, has been so left for purpose of delay only.

9. That the defendant has not left with the Clerk of this Court any notice to the effect that he disputes the jurisdiction of this Court.

Sworn, etc.

[See 14 App. R., 347.]

(18.) AFFIDAVIT TO SET ASIDE JUDGMENT AND BE ALLOWED TO DEFEND ON THE MERITS.

[See p. 154, ante.]

In the Division Court for the County of .

A. B., Plaintiff,

AGAINST

C. D., Defendant.

I, , of the of , in the County of , and Province of Ontario, (addition), make oath and say :

1. That I am the (or "one of the") above named defendant in this cause. (If made by a Solicitor or Agent it may be in this form, "That I am the Solicitor [or 'duly authorized Agent'] of the above named defendant in this cause, and, when not otherwise herein expressed, that I have a personal knowledge of the matters herein deposed to.")

2. That the summons herein was served on me (or "the above named defendant, as I am informed and believe,") on or about the day of last past.

3. That notice disputing the plaintiff's claim (or "of the Statute of Limitations, &c.," as the case may be, as mentioned in General Rule 20), was intended to be given herein, but (here set out particularly the reason why such notice was not given in time and accounting for the delay.)

4. That I have (or "the said defendant has") a good defence to this action on the merits, as I am advised and verily believe (or if made by Solicitor or Agent, "as I am instructed and verily believe,") and such defence consists in this (here particularly shew one or more of the grounds of defence relied on, so that the Judge may see that there is something to be tried should the application be granted.)

5. That the application to be made herein is not for the purpose of delaying the plaintiff in the recovery of judgment and execution against me (or "the said defendant") in this cause, but solely for the purpose of my (or "the above named defendant's") being allowed in to dispute the plaintiff's claim, and to defend this action on the merits aforesaid.

Sworn, &c.

(19.) AFFIDAVIT FOR JUDGMENT SUMMONS.

[See p. 245 ante.]

In the Division Court for the County of .

A. B., Plaintiff,

AGAINST

C. D., Defendant.

I, , of the of , in the County of , and
Province of Ontario, make oath and say:

1. That I am the above named plaintiff (or "the Solicitor or Agent for the above named plaintiff," as the case may be) in this cause.

2. That judgment was recovered in this cause on the day of in the year of our Lord one thousand eight hundred and , for the sum of dollars, debt (or "damages" or "costs," as the case may be), and the sum of dollars for costs of suit, and that the whole (or " dollars part") of the said judgment remains unsatisfied.

3. That I believe C. D., the defendant, sought to be examined herein, is able to pay the amount due in respect of the said judgment, or some part thereof (or "that C. D., the defendant, sought to be examined herein, has rendered himself liable to be committed to gaol under the Division Courts Act").

Sworn, etc.

(20.) AFFIDAVIT FOR PROHIBITION.

[Sinclair's D. C. Act, 1879, 47, 48 and 53-61 ante.]

(A Division of the High Court, no Cause.)

I, A. B., of the of , in the County of , and Province of Ontario, make oath and say:

1. That on the day of , A. D. 18 , I was served with the annexed copy of summons and particulars of demand thereto attached, marked "A."

2. That I am the defendant (or "one of the defendants") in the suit mentioned in the said summons of against myself (if others naming them also), in the Division Court for the (said) County of .

3. That I attended at the sittings of the said Division Court, held on the day of , A. D. 18 , and did there and then (through C. D., my Counsel or Agent, as the case may be), object to the jurisdiction of the said Division Court to entertain the said suit, inasmuch as I claimed to justify the said alleged trespass by right and title to the said close at the time when the said trespass was alleged to have been committed (or here set out any other

ground of objection which the deponent made, according to the circumstances of the case.)

4. That I did there and then offer to prove before the Judge of the said Court that I did *bona fide* claim the right and title to the said close, and that the same was my close, soil and freehold (or whatever other fact or facts were relied on before the Judge as shewing a want of jurisdiction, or what the defendant otherwise offered to prove.)

5. That the said close in which the said supposed trespass was committed is part of Lot number in the concession of the Township of , in the County of .

6. That I did, at the time when the said supposed trespass was committed, *bona fide* claim, and from thence continually hitherto, have *bona fide* claimed, the soil or freehold of the said land, by virtue of a conveyance (or as the case may be) thereof, heretofore made to me by one G. H., bearing date the day of , A. D. 18 , (or in such other way as the defendant claims title to the land.)

7. That the said close is part and parcel of the said land so conveyed (or as the case may be) as aforesaid, and that the said , the plaintiff in said Division Court suit, claims the said close adversely to me, and contends, as I believe, that the said close belongs to him, but which I say is not the case.

8. That the said Judge, notwithstanding my first objection, and notwithstanding my said offer to prove my said title as aforesaid, did proceed to hear and determine the said cause and gave judgment against me for \$ damages, together with costs, (or as the case may be), on the said day of , A. D. 18 , payable in days (or "forthwith" or "otherwise," as the case may be.)

9. That I have not paid the said damages or costs.

10. That execution has (or "has not") issued against me therefor.

Sworn, &c.

[If prohibition is applied for on any of the other grounds of want of jurisdiction, mentioned in sub-sections 1 to 7 inclusive, of Section 69 of this Act, or where the suit is for an amount beyond the jurisdiction of the Court, or where the cause of action is being divided, or where action is brought in the wrong division, &c., the above affidavit can be altered so as to make it conform to the circumstances. The affidavit should fully set out all facts and circumstances of the case; and if it can be corroborated this should be done in every essential particular, and by as many affidavits as can reasonably be procured, for it lies on the applicant to make out a case *clearly* of want of jurisdiction if he wishes prohibition on affidavit: 2 L. J. N. S., 266; 26 U. C. R., 123; 2 H. & N., 262.]

(21.) AFFIDAVIT FOR ORDER FOR SUBSTITUTIONAL SERVICE.

[See p. 139 ante.]

In the Division Court for the County of

A. B., Plaintiff,

AGAINST

C. D., Defendant.

I, E. F., of the of , in the County of , Bailiff of the above mentioned Court (or as the case may be), make oath and say :

1. That on or about the day of last past (or "instant"), I received from the Clerk of this Court the annexed summons and particulars of claim thereto attached, for service on the above named defendant.

2. That, in accordance with my duty in that respect, I did, on the day of instant (or "last past"), attend for the purpose of serving the said summons and claim on the defendant, at his place of residence at the of , and, on enquiring there for the said defendant, was informed by a person at and in the said place of residence, who represented herself to be and whom I believe to have been, the wife (or as the case may be; and if the name of the other person is known it had better be stated) of the said defendant, that the said defendant was not at home (here state the answer given), and I then stated to the said person the nature of my business, and told her (or "him") that I called to serve the defendant with the said summons and claim, and that I would call again for that purpose, at the said place of residence, on the day of then next, at or about of the clock, in the noon. (Here state what calls and other attempts were made to effect service, what, if anything, was done, and what the wife or other members of the family said in reply to the questions asked about the defendant, and his knowledge of the proceedings. If the defendant has absconded, the affidavit should here state when he absconded, and where he has gone to, if that can be ascertained, and his post-office address there, and for what purpose or with what object he went away. The post-office address of the defendant while he lived in Ontario should also be given, and generally such facts and circumstances should be shown as to make a Judge believe that all reasonable efforts had been made to effect personal service, and that either the summons had come to the knowledge of defendant or that he wilfully evaded service of the same, or had absconded.)

3. That I have used all due means in my power to serve the said defendant personally with a true copy of the said summons and claim, but have not been able to do so; and for the reasons aforesaid, I verily believe that the said summons has come to the knowledge of the defendant (or "that he wilfully evades the service of the same," or "that he has absconded to," naming the place particularly, if possible, to which he went, and when".)

Sworn, &c.

[The affidavit should state that the calls have been made at the defendant's place of residence, unless the defendant has no known place of residence, and that reasonable efforts had been made to ascertain it: Chitty's Forms, 13th Ed., 75-79. What the officer said (Dubois v. Lowther, 4 C. B., 228), and the answers to his inquiries (Fisher v. Goodwin, 2 C. & J., 94) should be distinctly stated in the affidavit.]

(22.) AFFIDAVIT OF SERVICE OF SUMMONS ON PARTNERSHIP FIRM.

[See pp. 146, 147 ante.]

(Court and Cause.)

The formal parts of the Affidavit will be the same as at pages 323, 324 of Sinclair's D. C. Act, 1879.] It will then proceed thus :

That I did on the day of , A. D. 18 , duly serve the above named partnership firm, the defendants in this cause, with &c. *(as in Forms 106 or 107, Sinclair's D. C. Act, 1879, 323, according to the nature of the summons),* by delivering the same personally *(or as the case may be)*, to K. L., who then was a partner in the said firm, *(then proceed to the close as in ordinary affidavits of service.)*

(23.) AFFIDAVIT OF SERVICE OF SUMMONS ON THE AGENT OF A CORPORATION THAT HAS NOT ITS CHIEF PLACE OF BUSINESS WITHIN THE PROVINCE.

[See pp. 140, 141 ante.]

(Court and Cause.)

I, E. F., of, &c, Bailiff of the Division Court of the County of
(or "of the above mentioned Court), make oath and say :

1. That I did on the day of , 18 , duly serve one G. H., as agent for the above defendants, with the within *(or "annexed")* summons, notices, memorandum or warnings therein and thereon, in this cause, by delivering a true copy of each to and leaving the same with the said G. H. personally.

2. That at the time of such service the said G. H. was the stationmaster *(or as the case may be)* of the above named defendants at *(name of place)*, and that at the said time he as such stationmaster *(or as the case may be)* had his office *(or place of business)* at said place ; that such office *(or place of business)* was at the time of such service within the division of the Division Court of the County of , and that I necessarily travelled miles to make such service.

Sworn, &c.

[If the summons or other process is necessarily served on some agent of the corporation whose office or place of business is not within the division of the Court out of which such summons or process issued, then the affidavit should shew that such office, &c., is nearest to such division.]

(24.) AFFIDAVIT ON APPLICATION TO CHANGE THE VENUE.

[See pp. 128-131 ante.]

In the Division Court for the County of .

A. B., Plaintiff,

AGAINST

C. D., Defendant.

I, C. D., of the Township of , in the County of , and Province of Ontario, make oath and say :

1. That I am the above named defendant in this cause, and was served with the summons herein on the day of instant (or "last past.")

2. That I intend to defend this suit ; that I have a good defence to this action upon the merits ; that the cause of action herein did not wholly arise in the division in which this action is brought ; and that the witnesses for the defence (or "some of the witnesses for the defence") reside within the division in which I resided (or "carried on business" or "resided and carried on business," as the case may be) at the time this action was brought, namely : (*here set out the names and residences of such witnesses*), and that the application to be made hereon is not to be so made for the purpose of delay.

3. That at the time this action was so brought I resided (or "carried on business," or "resided and carried on business," as the case may be), within the limits of the Division Court for the County of , and that the next two sittings of the said last mentioned Court will be held at on the (*here give the dates particularly, and, if possible, the hour of opening of the Court*), and that I desire to have this cause transferred to that Court, and tried at one of such sittings.

Sworn, &c.

[Should the affidavit be made by one of several defendants, or by a solicitor or agent, it can easily be adapted.]

It will be observed that the above form is somewhat wider than the Statute requires the affidavit to be. By adopting it, however, information will be given which will be of service to the Judge in making the order, facilitate the duties of the Clerk, and be of advantage to the opposite party.

(25.) AGREEMENT NOT TO APPEAL.

[See page 157 ante.]

In the Division Court for the County of .

A. B., *Plaintiff*,

vs.

C. D., *Defendant*.

We hereby agree not to appeal in this cause to the Court of Appeal against any decision of the Judge at any time made herein.

Dated this day of , A. D. 18 .

A. B.

C. D.

(26.) CLERK'S CERTIFICATE OF PROCEEDINGS TO COURT OF APPEAL.

(See p. 179 ante.)

In the Division Court for the County .

A. B., *Plaintiff*,

vs.

C. D., *Defendant*.

I, , Clerk of the said Court, do hereby certify to the Court of Appeal for the Province of Ontario, that the annexed papers contain true and examined copies of the summons in this cause, with all notices endorsed thereon, the claim, and any notice or notices of defence, and of the evidence and all objections and exceptions thereto, and of all motions or orders made, granted or refused herein ("together with such notes of the Judge's charge as have been made," *if the cause tried by a jury*), the judgment or decision in writing (*or "the notes thereof,"*) and all affidavits filed or used in the cause, together with all other papers filed in the cause affecting the questions raised by the appeal.

Given under my hand and the seal of the said Court this day of ,
A. D. 18 .

[Seal of Court.]

Clerk.

(27.) CONSENT TO AN APPEAL UNDER SECTION 148.

[See p. 177, ante.]

(Court and Cause.)

We hereby consent that this cause may be entered, heard and disposed of in the Court of Appeal for Ontario, pursuant to the provisions of Section 148 of the Division Courts Act.

Dated, etc.

(Signed by the parties, Counsel or Solicitors.)

(28.) ORDER STAYING PROCEEDINGS WITH A VIEW OF APPEAL.

[See pp. 177, 178, ante.]

In the Division Court for the County of

BETWEEN A. B., *Plaintiff*

AND

C. D., *Defendant*.E. F., *Claimant*.

Upon the application of the above named plaintiff (or "the above claimant" as the case may be), I hereby order that proceedings herein be stayed for ten days from the day of , A. D. 188 , in order to afford the said plaintiff (or "the above claimant" as the case may be) time to give the security in this cause to enable him to appeal, which security I direct to be by a bond in the sum of \$ or the sum of \$ paid into Court.

Dated this day of , A. D. 188 .

Judge.

29.) NOTICE OF APPEAL AND THE GROUNDS THEREOF.

[See pp. 179, 180, ante.]

In the Court of Appeal.

In a cause in Appeal from the Division Court for the County of , in which A. B. is plaintiff and C. D. defendant.

Take notice, that this cause has this day been set down for argument in appeal before a Judge of this Court, for the day of , A. D. 18 , and that such cause, having been appealed, will then be heard, and the grounds of such appeal are as follows:

1. [Here in separate paragraphs set out clearly and concisely the grounds of appeal relied on.]

Dated this day of , A. D. 18 .

A. B., Appellant,
(or Solicitor for Appellant.)

To C. D., the Respondent (or to the "Counsel, Solicitor or Agent," of the Respondent, as the case may be, naming him.)

[It is difficult to comply strictly with the ambiguous words "shall forthwith give notice thereof and of the appeal." It has, however, been attempted in the above form. The notice must be served according to Section 152. During the intervening seven days, the parties can, if not already done, instruct their Counsel for the argument of the case, and otherwise prepare for the hearing of the appeal.]

(30.) CERTIFICATE OF APPROVAL OF APPEAL BOND BY JUDGE.

[See p. 176 ante, and R. S. O. 513.]

Approved of by me this day of 18 .

Judge.

(31.) ORDER OF REFERENCE CONTAINING SPECIAL CLAUSES.

[See p. 219 ante.]

In the Division Court, in the County of .

Between A. B., Plaintiff,

AND

C. D., Defendant.

By consent of the plaintiff and defendant (or "agents" if so) given in open Court (or produced in writing to the Court, signed by themselves or their agents).

It is ordered that all matters in difference in this cause (and if consented to, add "and all matters within the jurisdiction of this Court in difference between the said parties") be referred to the award of so as said award be made in writing, ready to be delivered to the parties entitled to the same on or before the day of ; and that the said award may be entered as the judgment in this cause.

1. The said arbitrator to have power, by writing, signed by him, from time to time to enlarge the time for making his award.

2. That if either of the parties be dead before the making of the award, that the same may be afterwards delivered to their respective personal representatives who shall require the same.

3. That the costs of the reference and award shall be in the discretion of the said arbitrator (or as the case may be.)

4. That the arbitrator shall be at liberty to order and determine what he shall think fit to be done by either of the parties respecting the matters referred.

5. That the witnesses and parties shall be examined by the arbitrator on oath.

6. That the arbitrator shall be at liberty to proceed *ex parte* in case either party, after reasonable notice, shall at any time neglect or refuse to attend on the reference.

7. That the parties respectively shall produce before the arbitrator all books, deeds, papers, accounts, vouchers, writings and documents within their possession or control, which the arbitrator may require and call for as in his judgment relating to the matters referred.

8. That neither party shall wilfully and wrongly do or cause to be done any act to delay or prevent the arbitrator from making his award.

9. That neither of said parties shall bring or prosecute any action against the arbitrator concerning the matters referred.

10. That if either party shall by affected delay or otherwise, wilfully prevent the arbitrator from proceeding in the reference, or from making his award, he shall pay such costs to the other as the arbitrator shall think reasonable.

11. The said parties jointly and severally agree with the said arbitrator in consideration of his taking upon himself the burthen of the reference, to pay him his reasonable charges for the arbitration and award.

(Here add any other terms that the Judge may prescribe or the parties may agree upon.)

Given under the seal of the Court this

day of 18

X. Y.

Clerk.

(32.) APPEAL BOND WHERE THE PLAINTIFF IS APPELLANT.

[See p. 176 ante.]

Know all men by these presents, that we, A. B., of, &c., and E. F., of &c., and G. H., of, &c., are jointly and severally held and firmly bound to C. D., of, &c., in the penal sum of _____ dollars of lawful money of Canada (usually double the probable amount of defendant's costs in the Court below and in appeal, and where the defendant has a judgment in his favour on plea of set-off, of such sum too), to be paid to C. D., or his certain attorney, executors, administrators or assigns. For which payment, well and faithfully to be made, we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this _____ day of _____, in the year of our Lord one thousand eight hundred and eighty-_____.

Whereas a certain action is now depending in the _____ Division Court for the County of _____, wherein the above bounden A. B. is plaintiff, and the above named C. D. is defendant; and whereas the said action came on to be tried in the said Court on the _____ day of _____ last past, when a judgment was given for the said C. D. (If judgment postponed under section 144, it can be stated thus: "When judgment was postponed until the _____ day of _____ last past, at _____ of the clock in the _____ noon, at the office of the Clerk of the said Court, at which time and place judgment was given by the Judge of the said Court in writing for the said C. D.")

And whereas the said A. B., being dissatisfied with such judgment, duly applied for a new trial in the said cause, according to the Statutes and Rules of Court in that behalf, which application the said Judge in due course refused.

And whereas the said A. B., being dissatisfied with the decision of the said Judge on such application for a new trial, is desirous of appealing to the Court

of Appeal for the Province of Ontario, against such decision; and in pursuance of the Statutes in that behalf, this bond is given as security to enable the said A. B. so to appeal; and whereas the above bounden E. F. and G. H., at the request of the said A. B., have agreed to enter into the above written obligation for the purposes aforesaid.

Now, therefore, the condition of this obligation is such, that if the above bounden A. B. shall abide by the decision of the said cause by the said Court of Appeal, and pay all sums of money and costs, as well of the said suit as of the said appeal, awarded and taxed to the said C. D., then this obligation shall be void, otherwise the same shall remain in full force and effect.

Signed, sealed and delivered by the above bounden	A. B.	[Seal.]
A. B., E. F. and G. H., in the presence of	E. F.	[Seal.]
J. K.	G. H.	[Seal.]

(33.) APPEAL BOND WHERE THE DEFENDANT IS APPELLANT.

[See p. 176 ante.]

Know all men by these presents, that we, C. D., of, &c., and E. F., of, &c., and G. H., of, &c., are jointly and severally held, and firmly bound to A. B., of, &c., in the penal sum of dollars of lawful money of Canada (*usually double the amount of debt and costs in the Court below and the costs in appeal, or such lesser sum as the Judge directs*), to be paid to the said A. B., or his certain attorney, executors, administrators or assigns. For which payment, well and faithfully to be made, we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of , in the year of our Lord one thousand eight hundred and eighty .

Whereas, a certain action is now depending in the Division Court for the County of , wherein the above named A. B. is plaintiff, and the above bounden C. D. is defendant; and whereas the said action came on to be tried in the said Court on the day of last past, when a judgment was given for the said A. B., for the sum of dollars debt, together with costs of suit (*or as the case may be.*) [*If judgment postponed, under Section 144, can be stated thus: "When judgment was postponed until the day of last past, at of the clock in the noon, at the office of the Clerk of the said Court, at which time and place judgment was given by the Judge of the said Court, in writing, for the said A. B., for the sum of dollars, together with costs of suit."*]

And whereas, the said C. D., being dissatisfied with such judgment, duly applied for a new trial in the said cause, according to the Statutes and Rules of Court in that behalf, which application the said Judge in due course refused.

And whereas, the said C. D., being dissatisfied with the decision of the said Judge on such application for a new trial, is desirous of appealing to the Court

of Appeal for the Province of Ontario against such decision ; and, in pursuance of the Statutes in that behalf, this bond is given as security to enable the said C. D. so to appeal ; and whereas the above bounden E. F. and G. H., at the request of the said C. D., have agreed to enter into the above written obligation for the purposes aforesaid.

Now, therefore, the condition of this obligation is such, that if the above bounden C. D. shall abide by the decision of the said cause by the said Court of Appeal, and pay all sums of money and costs, as well of the said suit as of the said appeal, awarded and taxed to the said A. B., then this obligation shall be void, otherwise the same shall remain in full force and effect.

Signed, sealed and delivered by the above bounden	}	C. D.	[Seal.]
C. D., E. F. and G. H., in the presence of		E. F.	[Seal.]
J. K.		G. H.	[Seal.]

[The above forms will probably have to be changed in the recitals to meet the facts in many cases.]

(34.) APPEAL BOND ON APPEAL AGAINST AN ORDER FOR PAYMENT OF WAGES.

[See R. S. O., p. 1286.]

Know all men by these presents, that we, C. D., of, &c., and E. F., of, &c., and G. H., of, &c., are jointly and severally held and firmly bound to A. B., of, &c., in the penal sum of one hundred dollars of lawful money of Canada, to be paid to the said A. B., or his certain attorney, executors, administrators or assigns. For which payment, well and faithfully to be made, we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of , in the year of our Lord one thousand eight hundred and eighty .

Whereas the said A. B., on the day of instant (or "last past,") made complaint against the said C. D., before L. M., one of Her Majesty's Justices of the Peace in and for the County of [or "the Police Magistrate in and for the City (or Town) of ,"] for the alleged non-payment of wages by the said C. D. to the said A. B.

And whereas the said C. D. was, on the day of instant (or "last past,") by the said L. M., as such Justice as aforesaid (or "as such Police Magistrate,") ordered to pay to the said A. B. the sum of (here fully and particularly state the substance of the order.)

And whereas the said C. D., being dissatisfied with the decision of said complaint, and with the said order made thereon, is desirous of appealing against the same to the Division Court for the (said) County , at its (next) sittings, to be held on the day of next (or "instant,") and, in pursuance of the Statute in that behalf, this bond is given as security for such appeal.

And whereas the above bounden E. F. and G. H., at the request of the

said C. D., have agreed to enter into the above written obligation, for the purposes aforesaid.

Now, therefore, the condition of this obligation is such, that if the above bounden C. D. shall personally appear at the said Court and try such appeal, and abide the judgment of the Court thereon, and pay such costs as shall be by the said Court awarded, then this obligation shall be void, otherwise the same shall remain in full force and effect.

Signed, sealed and delivered by the above bounden	}	C. D.	[Seal.]
C. D., E. F. and G. H., in the presence of		E. F.	[Seal.]
J. K.		G. H.	[Seal.]

[The above form can be altered to suit the circumstances of any particular case.]

(35.) APPEAL BOND ON APPEAL FROM COUNTY COURT WHERE PLAINTIFF IS APPELLANT.

[See R. S. O., p. 513.]

Know all men by these presents, that we, A. B., of, &c., and E. F., of, &c., and G. H., of &c., are jointly and severally held and firmly bound to C. D., of, &c., in the penal sum of dollars of lawful money of Canada (usually double the probable amount of defendant's costs in the Court below and in appeal) and where the defendant has a verdict in his favour on a plea of set-off, of such sum too), to be paid to the said C. D., or to his certain attorney, executors, administrators or assigns. For which payment well and faithfully to be made we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this day of , in the year of our Lord one thousand eight hundred and eighty-

Whereas a certain action (or "a certain interpleader issue," or as the case may be) is now depending in the County Court of the County of , wherein the above bounden A. B. is plaintiff, and the above named C. D. is defendant; and whereas the said action (or "cause") came on to be tried at the last June (or "December") sittings of the said Court [or "at the last April, or October, sittings of the said Court for trials of causes without a jury," or "on the day last past (or 'instant') when the Judge of the said Court held a special sittings thereof for trials of causes without a jury"], when a verdict was rendered therein and judgment entered for the said C. D. (or "when the said action was dismissed with costs").

And whereas the said A. B., in due course, moved in said cause for and obtained an Order *Nisi* from the said Court to set the said verdict and judgment aside, and for a new trial to be had between the parties (or "and to enter

judgment therein for the said A. B. instead," or as the case may be), which, after argument, was discharged.

And whereas the said A. B., being dissatisfied with the decision of the Judge of the said Court upon said Order *Nisi*, is desirous of appealing therefrom to the Court of Appeal for the Province of Ontario, and, in pursuance of the Statute in that behalf, this bond is given as security to enable the said A. B. so to appeal; and whereas the above bounden E. F. and G. H., at the request of the said A. B., have agreed to enter into the above written obligation for the purposes aforesaid.

Now, therefore, the condition of this obligation is such, that if the above bounden A. B. shall abide by the decision of the said cause by the said Court of Appeal, and pay all sums of money and costs, as well of the said suit as of the said appeal, awarded and taxed to the said C. D., then this obligation shall be void, otherwise the same shall remain in full force and effect.

Signed, sealed and delivered by the above bounden	A. B.	[Seal.]
A. B., E. F. and G. H., in the presence of	E. F.	[Seal.]
J. K.	G. H.	[Seal.]

(36.) APPEAL BOND FROM COUNTY COURT WHERE DEFENDANT IS APPELLANT.

[See R. S. O., p. 513.]

Know all men by these presents, that we, C. D., of, &c., and E. F., of, &c., and G. H., of, &c., are jointly and severally held and firmly bound to A. B., of, &c., in the penal sum of _____ dollars of lawful money of Canada (usually double the amount of the verdict and costs in the Court below and the probable costs of the appeal, or such lesser sum as the Judge directs), to be paid to the said A. B., or to his certain attorney, executors, administrators or assigns. For which payment, well and faithfully to be made, we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this _____ day of _____, in the year of our Lord one thousand eight hundred and eighty _____.

Whereas a certain action (or "a certain interpleader issue," or as the case may be) is now depending in the County Court of the County of _____, wherein the above named A. B. is plaintiff, and the above bounden C. D. is defendant; and whereas the said action (or "cause") came on to be tried at the last June (or "December") sittings of the said Court (or "at the last April, or October, sittings of the said Court for trials of causes without a jury," or "on the _____ day of _____ last past (or 'instant'), when the Judge of the

said Court held a special sittings thereof for trials of causes without a jury"] when a verdict was rendered therein and judgment entered for the said A. B.

And whereas the said C. D. in due course moved in said cause for and obtained an Order *Nisi* from the said Court to set the said verdict aside and for a new trial to be had between the parties (or "and to enter judgment therein for the said C. D. instead," or as the case may be), which, after argument, was discharged.

And whereas the said C. D., being dissatisfied with the decision of the Judge of the said Court upon said Order *Nisi*, is desirous of appealing therefrom to the Court of Appeal for the Province of Ontario, and, in pursuance of the Statute in that behalf, this bond is given as security to enable the said C. D. so to appeal; and whereas the above bounden E. F. and G. H., at the request of the said C. D., have agreed to enter into the above written obligation for the purposes aforesaid.

Now, therefore, the condition of this obligation is such, that if the above bounden C. D. shall abide by the decision of the said cause by the said Court of Appeal, and pay all sums of money and costs, as well of the said suit as of the said appeal, awarded and taxed to the said A. B., then this obligation shall be void, otherwise the same shall remain in full force and effect.

Signed, sealed and delivered by the above bounden	}	C. D.	[Seal.]
C. D., E. F. and G. H., in the presence of		E. F.	[Seal.]
J. K.		G. H.	[Seal.]

[Where the appellant does not take out an Order *Nisi*, but goes direct to the Court of Appeal, the recital in these two Forms of the taking out such Order will be omitted.]

(37.) APPEAL BOND ON DEMURRER IN COUNTY COURT.

[See R. S. O., p. 513.]

Know all men by these presents, that we, A. B., of, &c., and E. F., of, &c., and G. H., of, &c., are jointly and severally held and firmly bound to C. D., of, &c., in the penal sum of _____ dollars of lawful money of Canada (*usually double the probable amount of the costs in the Court below and in appeal, and if the demurrer determines the suit, then also in double the amount depending upon the decision, in addition, or such lesser sum as the Judge directs*), to be paid to the said C. D., or to his certain attorney, executors, administrators or assigns. For which payment, well and faithfully to be made, we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this _____ day of _____ in the year of our Lord one thousand eight hundred and eighty _____.

Whereas a certain action is now depending in the County Court of the County of _____, wherein the above bounden A. B. is plaintiff, and the said

C. D. is defendant ; and whereas certain questions of law arose in said *cause* by way of demurrer, and whereas also said demurrer was duly set down for argument, and was argued in said Court ; and thereupon, in due course, judgment was given on the said demurrer in favour of the said C. D.

And whereas the said A. B., being dissatisfied with the decision of the Judge of the said Court upon the said demurrer, is desirous of appealing therefrom to the Court of Appeal for the Province of Ontario ; and in pursuance of the Statute in that behalf, this bond is given as security to enable the said A. B. so to appeal ; and whereas the above bounden E. F. and G. H., at the request of the said A. B., have agreed to enter into the above written obligation for the purposes aforesaid.

Now, therefore, the condition of this obligation is such that if the above bounden A. B. shall abide by the decision of the said *cause* by the said Court of Appeal, and pay all sums of money and costs, as well of the said suit as of the said appeal, awarded and taxed to the said C. D., then this obligation shall be void otherwise the same shall remain in full force and effect.

Signed, sealed and delivered by the above bounden	}	A. B.	[Seal.]
A. B., E. F. and G. H., in the presence of		E. F.	[Seal.]
J. K.		G. H.	[Seal.]

[If the defendant appeals, the above form can easily be adapted. Should there be an appeal under chap. 47, section 42, R. S. O., the above Forms can easily be adapted.]

(38.) AFFIDAVIT OF JUSTIFICATION OF SURETIES TO CLERK'S OR BAILIFF'S COVENANT.

[See pp. 15, 16, ante.]

County of } We, , of the of , in the County
 To wit: } of , and , of the of , in the County
 of within named, severally make oath and say :

1. And first, I, this deponent (*naming him*), for myself, say, that I am a freeholder and resident within the County of .

2. That I am one of the sureties mentioned in the annexed Covenant, for the due performance by (*name of the Clerk*) of the duties of the office of Clerk of the Division Court for the County of .

3. That I reside at in the said and am worth real property to the amount of dollars over and above all encumbrances, and over and above what will pay all my just debts, and every other sum for which I am now bail, or for which I am surety.

4. That I am not surety for any public officer except for the said .

5. And I, the said (*naming him*), for myself, say, that I am a freeholder and resident within the County of .

6. That I am one of the sureties in the annexed Covenant, for the due performance by (*name of the Clerk*), of the duties of the office of Clerk of the Division Court for the County of .

7. That I reside at , and am worth real property to the amount of dollars over and above all encumbrances, and over and above what will pay all my just debts, and every other sum for which I am now bail, or for which I am surety.

8. That I am not surety for any public officer except for the said .

The above named deponents (*naming them*) where severally sworn before me at in the County of this day of A. D. 18 .

A Commissioner for taking Affidavits in and for the County of .

(39.) AFFIDAVIT OF EXECUTION OF CLERK'S OR BAILIFF'S COVENANT.

[See pp. 15, 16, ante.]

County of) I, of the of , in the County of
To wit.) make oath and say :

1. That I was personally present, and did see the foregoing Covenant duly signed, sealed, and executed, by (*naming them all*), the obligors therein named, on the day of the date thereof, at .

2. That I am a subscribing witness to the execution of such Covenant and the signature " " thereto affixed is in my own proper handwriting.

3. That I am personally acquainted with the said (*naming the sureties*), who severally reside at the of in the County of Sworn, &c.

[The Government issues Forms of Covenant and Affidavits of Juratification and Execution. The writer prefers the above Forms. No objection to use either.]

(40.) CERTIFICATE OF CLERK OF THE PEACE OF COPY OF COVENANT.

[See p. 17 ante.]

I hereby certify that the within is a true copy of the Covenant of A. B. (*Clerk or Bailiff*) of the Division Court for the County of , and C. D. and E. F. his sureties, together with all copies of affidavits of execution and justification and endorsements thereon, filed in the office of the Clerk of the Peace for the said County of , on the day of A. D. 18 .

Given under my hand, this day of , A. D. 18 .

*Clerk of the Peace in and for the County
(or United Counties) of*

(41.) CERTIFICATE OF JUDGE'S APPROVAL OF CLERK'S OR BAILIFF'S COVENANT.

[See p. 16 ante.]

I hereby certify that the within Covenant is for the sums which I directed, and I hereby approve and declare such Covenant sufficient.

Judge.

(42.) CERTIFICATE OF CLERK OF THE PEACE THAT CLERK'S OR BAILIFF'S COVENANT HAS BEEN FILED.

[See p. 16 ante.]

I hereby certify that the Covenant of A. B., as Clerk (or "Bailiff") of the Division Court for the County of , with C. D. of, &c. (*addition*), and E. F., of &c. (*addition*), as his sureties therein, approved and declared sufficient under the hand of the Judge of the said County, has this day been duly filed in the office of the Clerk of the Peace in and for the County of .

Dated this day of , A. D. 18 .

Clerk of the Peace in and for the County of .

(43.) REPLEVIN BOND.

(TO BE USED IN ALL CASES EXCEPT IN CASES OF DISTRESS FOR RENT OR
DAMAGE-FEASANT.)

[See *Sinclair's D. C. Law, 1885, 229-253.*]

Know all men by these presents, that we, A. B., of, &c., W. B., of, &c. and J. S., of, &c., are jointly and severally held and firmly bound to V. W., Bailiff of the Division Court in the County of , in the sum of \$, to be paid to the said Bailiff, or his certain attorney, executors, administrators or assigns, for which payment, to be well and truly made, we bind ourselves and each and every of us in the whole, our and each and every of our heirs, executors and administrators firmly by these presents, sealed with our seals, and dated this day of , A. D. 18 .

The condition of this obligation is such, that if the above bounden A. B. do prosecute his suit with effect and without delay against C. D. for the taking and unjustly detaining (or "unjustly detaining," as the case may be) of his cattle, goods and chattels, to wit: (*here set forth the property distrained taken or detained*), and do make a return of the said property, if a return thereof shall be adjudged, and also do pay such damages as the said C. D. shall sustain by the issuing of the writ of replevin if the said A. B. fails to recover judgment in the suit, [and also to indemnify and save harmless the said C. D. from all loss and damage which he may sustain by reason of the seizure, and of any deterioration of the property in the meantime, in the event of its being returned, and all costs, charges and expenses which the said C. D. may incur, including reasonable costs not taxable between party and party]; and further do, observe, keep and perform all orders made by the Court in the suit; then this obligation shall be void or else remain in full force and effect.

Signed, sealed and delivered
in the presence of }

A. B. [L.S.]

W. B. [L.S.]

J. S. [L.S.]

[That part of the above Form within brackets is rendered necessary by what was the Statute 48 Vict., chap. 13. sec. 8, now part of R. S. O. and Rules of Court, and is to be used in all cases except in actions for distress for rent or damage-feasant, in either of which cases that part must be omitted.]

(44.) CLERK'S CERTIFICATE OF COPY OF SIGNED ENTRIES IN
PROCEDURE BOOK.

[See p. 21, ante.]

I hereby certify that the annexed (or "within") paper contains a true copy of the signed entries appearing in the Procedure Book of the Division Court for the County of _____, as there noted, of all summonses, orders, judgments, executions, and returns thereto, in a certain cause in said Court of A. B., plaintiff, against C. D., defendant; and on the page of the said book in which said entries were so noted is the name of me, the present Clerk of said Court (or "E. F., the Clerk of said Court when such entries were made"), written in my own proper handwriting (or "in the proper handwriting of the said E.F.")

Given under my hand and the seal of the said Court at _____ this
day of _____, A. D. 18 .

[Seal.]

Clerk of the Division Court
for the County of _____

(45.) CERTIFICATE OF JUDGE AS TO EXCEPTION IN EXEMPTION
LAW WHERE DEBT IS CONTRACTED PRIOR TO THE
FIRST DAY OF OCTOBER, 1887.

[See R. S. O., chap. 64. s. 7.]

I _____ Judge of the Division Court for the County of _____, do hereby certify under the provisions of Chapter 64, Section 7 of the Revised Statutes of Ontario, that this writ of execution is for the recovery of a debt contracted before the first day of October, 1887, as appears by the papers on file herein.

Dated the _____ day of _____ 18 .

Judge.

[The above certificate to be endorsed on the execution.]

(46.) PAY LIST OF JURORS AND JUDGE'S CERTIFICATE TO
COUNTY TREASURER FOR MONEY.

[See pp. 190, 191, ante.]

Summoned to attend at a Sittings of the Division Court of the County
of , on the day of , A. D. 18 .

No. ON LIST	NAMES OF JURORS.	DATE OF SERVICE.	ATTEND- ANCE.		AMOUNT PAID EACH JUROR.		SIGNATURE OF JUROR ACKNOW- LEDGING RECEIPT OF MONEY.
			1st Day.	2nd Day.	\$	c.	
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							
11							
12							
Total amount paid by Clerk \$							

I, , presiding Judge of the above mentioned Court, do hereby,
in pursuance of the 172nd section of the Division Courts Act, certify to the
Treasurer of the said County of , that the above is a true statement of
the amount paid by the Clerk of the said Court to each of the Jurors mentioned
in the above list, who were summoned and attended said Sittings, and
neither of whom so attended as a witness in any cause or as a litigant in his
own behalf, amounting in the whole to \$.

Dated this day of , 18 .

Judge.

(47.) RETURN BY JUDGE TO CERTIORARI.

[See page 123, ante.]

In the High Court of Justice. Queen's Bench Division (or as the case may be).

The answer of me, A. B., Judge of the County Court of the County of _____, who, by virtue of this writ, to me directed and delivered, do, under my hand and seal, certify unto Her Majesty, in her High Court of Justice for Ontario, at Toronto, the (here describe what the writ calls for), of which mention is made in the same writ. The return to this writ further appears by a certain schedule annexed thereto.

In witness whereof, I, the said A. B., have to this affixed my hand and seal, this _____ day of _____, 18 ____.

A. B. [L.S.]

[The following schedule will be annexed to the certiorari]:

SCHEDULE

Referred to in the return to the annexed writ of certiorari indorsed thereon. (Here give in regular order the papers in the suit returned with the certiorari, and annex the original papers to the schedule.)

A. B.,

Judge of the County Court of the County of _____.

(48.) ORDER FOR COMMISSION TO TAKE EVIDENCE.

[See p. 178, ante.]

In the County Court of the County of _____.

In a cause in the Division Court for the County of _____, in which A. B. is plaintiff and C. D. is defendant. Upon hearing the parties, and upon reading the affidavit of _____, I do order that the plaintiff shall be at liberty to examine upon oath E. F., of, &c., one of the witnesses in the above mentioned cause, and now residing without the limits of the Province of Ontario, upon interrogatories to be administered to him on the part and behalf of the plaintiff by and before G. H., of, &c. (addition) at the said _____ of _____ at such time and place therein as the said G. H. shall there appoint, the plaintiff, his solicitor or agent, giving _____ previous notice in writing of his intended examination, and a copy of the said interrogatories to the defendant, his solicitor or agent; and that the defendant shall have the right to administer cross-interrogatories, and to cross-examine the said E. F. *viva voce*; and the questions so put shall be taken down, and his answers thereto, as well as to the cross-interrogatories, in writing, and returned as part of the examination.

And I further order that for the purpose of such examination a commission

do issue out of and under the seal of the said County Court, according to the usual practice thereof, to the said G. H. to take the said examination under such commission at the time and place and in the manner hereinbefore mentioned, and according to the usual directions of the Court.

I further order that the said interrogatories, cross-interrogatories (if any) and depositions taken thereon, together with said commission, be transmitted under the seal of the said G. H. without delay to _____, Clerk of the County Court of the County of _____, in the Province of Ontario, Dominion of Canada, at (here give P. O. address), on or before the _____ day of _____ next.

(Here make provision for Costs.)

Dated at Chambers, this _____ day of _____, 18 ____.

Judge of the County Court of the County of _____.

(49.) CONSENT TO TRY CASE IN DIVISION COURT.

[See p. 134, ante.]

(Court and Cause, if any.)

We hereby consent to this cause being (entered), tried and finally disposed of under the 91st Section of the Division Courts Act, in the Division Court for the County of _____.

Dated, &c.

A. B. } (Or by their Counsel,
C. D. } Solicitor or Agents.)

(50.) SUMMONS AT INSTANCE OF CLERK FOR PAYMENT OF FEES UNDER SECTION 55.

[See p. 32 ante.]

No. _____ In the _____ Division Court for the County of _____.

BETWEEN A. B., *Plaintiff*,

AND

C. D., *Defendant*.

To the above named Plaintiff :

You are hereby summoned to be and appear at the next sittings of this Court, to be holden at the Town Hall (or as the case may be), in the _____ of _____, in the County of _____ on _____ day, the _____ day of _____ A. D. 18 ____, at the hour of _____ of the clock in the _____ noon, then and there to show cause why an order should not be made against you to pay the fees now remaining unpaid of the above mentioned suit, amounting to the sum of _____ dollars and _____ cents, according to the provisions of the 55th section of the Division Courts Act, and in the event of your not so appearing an order to pay the same to the Clerk of the said Court may nevertheless be made against you.

Dated this _____ day of _____, A. D. 18 ____.

Judge.

(51) ORDER FOR COUNSEL FEE.

[See pp. 225, ante.]

(Court and Cause.)

I hereby direct a fee of \$ to be taxed to the plaintiff
(or defendant) for the attendance of A. B., as counsel [or solicitor or agent].
on the trial of this cause, on his behalf.

Dated this day of A. D. 18 .

Judge.

(52.) DEMAND FOR STATEMENT OF NAMES AND PLACES OF RESIDENCE OF PERSONS CONSTITUTING PLAINTIFFS' FIRM.

[See p. 147, ante.]

(Court and Cause.)

Sir,—

On behalf of the above named defendant E. F., I require of you forth-
with to declare to me in writing the names of all persons who are partners
in the firm of A. B. & Co., the above named plaintiffs, pursuant to the
108th section of the Division Courts Act.

Dated, &c.

Yours, &c.,

M. N.,

Solicitor (or Agent) for the Defendant, E. F.

To Mr. X. Y.,

the Plaintiff's Solicitor (or Agent), (or as the case may be.)

(53.) DECLARATION IN ANSWER THERETO.

[See p. 147, ante.]

(Court and Cause.)

Sir,—

The names and places of residence of all the persons constituting the firm
of A. B. & Co., the above named plaintiffs, are as follow :

A. B., who resides at, &c.

G. H., who resides at, &c.

L. M., who resides at, &c.

Dated, &c.

Yours, &c.,

X. Y.,

Plaintiffs' Solicitor (or Agent.)

To Mr. M. N.,

Solicitor (or Agent) for the Defendant E. F.

(54.) NOTICE OF APPLICATION FOR ORDER FOR NAMES OF MEMBERS OF FIRM.

[See p. 147 ante.]

(Court and Cause.)

Sir:—

Take notice that a motion will be made on behalf of the above named defendant to the Judge of this Court, at his Chambers in the Court House, in the City of Hamilton (*or as the case may be*), on the day of , 18 , at ten o'clock in the forenoon, or so soon thereafter as the motion can be heard, for an order under the 108th section of the Division Courts Act, directing a statement to be furnished to me of the names of all the persons who are co-partners in the firm of A. B. & Co., the above named plaintiffs. That on such application will be read the affidavits of copies of which are hereto annexed.

Dated, &c

Yours, &c.,

M. N.,

Solicitor (*or "Agent"*) for the Defendant E. F.

To Mr. X. Y.,

The Plaintiffs' Solicitor (*or "Agent," as the case may be*).

(55.) FORM OF ORDER FOR STATEMENT OF THE NAMES OF ALL THE PERSONS WHO ARE CO-PARTNERS IN THE PLAINTIFFS' FIRM.

[See p. 147, ante.]

(Court and Cause.)

Date, &c.

Upon the application of the above named defendant in this cause, and upon reading the affidavit of service of demand herein, and of (*if any other affidavit filed*) and upon hearing the parties by their solicitors (*or agents*);

It is ordered that the above named plaintiffs do within days of the service of this order furnish to the defendant, his solicitor or agent, a statement of the names of all the persons who are co-partners in the firm of A. B. & Co., the above named plaintiffs.

It is further ordered, that the costs of this application shall be costs in the cause (*or as the case may be.*) (*Any other terms may be here added.*)

JUDGE.

[A previous demand would not be absolutely necessary to the application, but the writer advises it to be made: FIRST, as a matter of courtesy and to save the trouble of an application if the demand should be complied with

SECOND, to subject the opposite party, in the discretion of the Judge, to the costs of the application, if the demand was not complied with. This section does not say anything about the costs of the application, but the Judge would have power over them as "a proceeding not otherwise provided for" under section 207 of the Division Courts Act. In analogy to other cases the Judge might possibly impose costs on a party refusing to furnish the required information or make them costs in the cause. To have made this section complete a penalty should have been allowed to be imposed by the Judge for default in furnishing the required information. What can be done if not furnished does not seem clear.]

(56.) FORM OF JUDGMENT AGAINST A FIRM, &c.

[See pp. 147, 148, ante.]

Judgment for the plaintiff against the said Firm of A. B. & Co., and also against O. P., the partner thereof served with the copy of summons herein, and who has failed to appear (and if against any person who has admitted in the notice of dispute or defence filed that he is, or who has been adjudged, a partner, then proceed thus :) and against Q. R., who has by his notice of dispute filed herein admitted that he is a partner, and S. T., who is hereby adjudged a partner of the said firm; for \$, and \$ costs, to be paid forthwith (or as the case may be).

[The above Form may be more specific than there is any necessity for, but the writer thinks it is better to err on the side of safety. With the above memorandum of judgment before him the Clerk will have no difficulty in determining against whom the execution should issue.]

(57.) SUMMONS TO PRIMARY DEBTOR (BEFORE JUDGMENT) AND GARNISHEE.

[See p. 202 ante.]

No. A. D., 18 .

In the Division Court in the County of .

[Seal.]

Between A. B., Primary Creditor,

AND

C. D., Primary Debtor,

AND

E. F., Garnishee.

The Primary Creditor claims from the Primary Debtor the amount of the annexed account:

(Giving the Account or Claim in detail.)

You, the above named Primary Debtor, are hereby summoned to appear

at the sittings of this Court, to be held at _____ on the _____ day of _____, A. D. 18____, (or at _____ on the _____ day of _____ A. D. 18____, before the Judge then and there presiding), to answer the Primary Creditor, who sues you for the recovery of the annexed claim. And you, the Garnishee, are required to appear at the same time and place to state and shew whether or not you owe any and what debt to the Primary Debtor, and why you should not pay the same into Court to the extent of the Primary Creditor's claim, in satisfaction thereof: and take notice, that if any or either of you desire to set up any Statutory or other defence, or any set-off, or to admit the liability of any or either of you, in whole or in part, for the amount claimed in this action, you shall file with the Clerk of this Court *the particulars* of such defence or set-off, or any admission of the amount due or owing by any or either of you, within eight days after service on you respectively of this Summons.

You and all others interested may also shew any other cause why the debt owing from the Garnishee should not be paid and applied to satisfy the said claim of the Primary Creditor.

Dated the _____ day of _____ A. D. 18____. X. Y., Clerk.

WARNING TO GARNISHEE AND PRIMARY DEBTOR.

To the above named Garnishee and the Primary Debtor:

You, the said Garnishee, are hereby notified, that from and after the time of the service of this Summons on you, all debts due or accruing due from you to the above named Primary Debtor are attached, and if you pay the same to any one other than to the person holding the proper order to receive the same, or into Court, you will be liable to repay it, in case the Court or Judge so order.

And you, the said Primary Debtor and Garnishee, are hereby notified that if any or either of you desire to set up any Statutory or other defence, or any set-off, or to admit your or either of your liability, in whole or in part, for the amount claimed herein, you must file with the Clerk of this Court *the particulars* of such defence or set-off, or an admission of the amount due or owing by any or either of you, *within eight days after service on you* respectively of this Summons, and that in the absence of notice of such defence or set-off, the Judge in his discretion may give judgment against you for the amount claimed.

N. B.—If the claim is for board or lodging, and if the debt sought to be garnished is for wages or salary, add the following Memorandum:

MEMORANDUM UNDER THE DIVISION COURTS ACT, SECTION 177.

(1) The primary debtor resides at the City of Hamilton, in the Province of Ontario, and his occupation in the service of the garnishee is that of an engine-driver (or as the case may be) on the railway of the garnishees (the Grand Trunk Railway Company of Canada), and is occupied as such on said railway between the cities of Toronto and Hamilton (or as the case may be).

(2) The debt alleged (or if after judgment, "adjudged") to be due by the primary debtor to the primary creditor was incurred for board or lodging.

(58.) INVENTORY OF GOODS SEIZED UNDER ATTACHMENT.

[See pp. 259, 260, ante.]

An Inventory of goods and chattels (property and effects) by me this day seized and taken, in the Township of _____, by virtue of a warrant of attachment issued by T. L., Clerk of the _____ Division Court of the County of _____ (or as the case may be), on behalf of A. B., for the sum of _____, against the personal estate and effects of C. D.; that is to say, one lumber waggon, one plough, &c. (stating all the articles seized).

Dated this _____ day of _____, A. D. 18 _____.

B. F.,

Bailiff of the _____ Division Court, County of _____.

(59.) JUDGMENT AGAINST MARRIED WOMAN UNDER MARRIED WOMEN'S PROPERTY ACT.

[See R. S. O. Chap. 132.]

It is adjudged that the plaintiff do recover \$ _____ and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless by reason of section 20 of Chapter 132 of the Revised Statutes of Ontario the property shall be liable to execution notwithstanding such restriction.

Dated this _____ day of _____, A. D. 18 _____.

Judge.

[The above Form is taken from Scott v. Morley, 20 Q. B. D., p. 132.]

(60.) JUDGMENT WHERE THE PLAINTIFF'S CLAIM IS FOR A DEBT AND UNLIQUIDATED DAMAGES AS WELL.

[See pp. 78 80 ante.]

Judgment for the plaintiff for \$ _____ in respect of the claim for \$ _____ and for \$ _____ in respect of the claim for \$ _____ and \$ _____ costs; to be paid in _____ days (or "forthwith").

(Add "on verdict by jury," if such be the fact.)

(61.) NOTICE OF MOTION FOR IMMEDIATE JUDGMENT.

[See pp. 152-154 ante.]

In the Division Court of the County (or "united Counties") of

BETWEEN A. B., Plaintiff,

AND

C. D., Defendant.

Take notice that a motion will be made on behalf of me, the above named plaintiff, before the Judge of this Honourable Court, at his Chambers, in the Court House, in the of , in the said County of , on day, the day of , A. D. 18 , at o'clock in the noon, or so soon thereafter as the motion can be heard, for an order that I, the plaintiff herein, be at liberty to have final judgment entered in my favor in this cause by the Clerk of this Court for the amount of the debt or money demand sought to be recovered in this action, together with interest, if any, and costs, and that in support of such motion will be read the affidavit of me, the plaintiff herein, a true copy of which accompanies this notice.

Dated this day of A. D. 18 .

Yours, &c.,

A. B., the Plaintiff,

or,

E. F., Solicitor (or "Agent") for the above named Plaintiff in this action.

To C. D., the above named Defendant herein.

[N. B.—If given to any other person who has authority to receive the notice, address it accordingly; and if any other affidavit is to be used reference should be made to it and a copy served.]

(62.) FORM OF JUDGMENT SUMMONS AFTER ENTRY OF JUDGMENT BY THE CLERK.

[See D. C. Law, 1885, 283.]

SUMMONS TO DEFENDANT AFTER JUDGMENT.

In the Division Court of the County of .
No. A. D. 18 .

[Seal.]

Between A. B., Plaintiff,

AND

C. D., Defendant.

To the above named defendant:

Whereas, on the day of A. D. 18 , the plaintiff duly recovered judgment against you in said Court for \$ for debt, and \$ for costs of suit, which amounts remain unsatisfied (or, if part paid, "of which the sum of \$ remains unsatisfied.") You are therefore, etc. (the same as at page 293 of Sinclair's D. C. Act, 1879, Form 28.)

(63) NOTICE DISPUTING JURISDICTION.

In the Division Court for the County of .

[See pp. 201, 203 ante.]

A. B., Plaintiff,

vs.

C. D., Defendant.

You are hereby required to take notice that I dispute the jurisdiction of this Court to entertain and try this case.

Dated this day of , A. D. 18 .

C. D., the Defendant,

or,

E. F., Solicitor (or "Agent") for the Defendant.

To A. B., the Plaintiff, and the Clerk of this Court.

(64.) NOTICE OF APPLICATION FOR APPROVAL OF APPEAL BOND.

[See pp. 177, 178, ante.]

In the Division Court for the County of .

A. B., Plaintiff,

vs.

C. D., Defendant.

Take notice that I will, on the day of instant, at o'clock in the forenoon (or as the case may be), apply to the Judge of this Court, at his chambers in , for the approval of the appeal bond herein, in pursuance of the Statute in that behalf, and that the names, residences, and additions of the sureties in the said bond are (here state the same particularly, so that the respondent may find them out.)

Dated this day of A. D. 18 .

L. M.,

Plaintiff's (or "Defendant's") Attorney or Agent.

To N. O.,

Defendant (or "Plaintiff's") Attorney or Agent.

(65.) NOTICE OF APPEAL UNDER MASTERS' AND SERVANTS' ACT.

[See R. S. O., p. 1286.]

To A. B., of, &c. (*the name and addition of the party to whom the notice of appeal is required to be given*).

Take notice, that I, the undersigned C. D., of, &c., being the person aggrieved by the order hereinafter mentioned, do intend to enter and prosecute an appeal at the (next) sittings of the Division Court for the County of to be holden at on the day of next (or "instant") against a certain order made by L. M., Esquire, one of Her Majesty's Justices of the Peace in and for the (said) County of [or "Police Magistrate in and for the City (or Town) of], whereby I, the said A. B., was ordered to pay (*here state the terms of the order made as fully and correctly as possible*).

And further take notice, that the cause and matter of my appeal are, first that [I never was indebted to the said A. B. for the said amount of wages so ordered to be paid by me; secondly, that before the proceedings were taken on which the said order was made I paid the said A. B. the wages in said order mentioned], (*together with any other cause or matter of appeal, care being taken that all grounds of appeal relied on are stated, as the appellant will be precluded from going into any other than those stated.*)

Dated this day of , A. D. 18 .

A. B.

(66.) NOTICE OF APPEAL AGAINST AN ORDER FOR THE PRICE OF SHEEP KILLED BY DOGS.

[See R. S. O., Chap. 214, s. 15, sub-s. 6.]

(*The notice in this case can easily be adapted from the next preceding Form.*)

(67.) DEMAND OF JURY IN THE TWO LAST CASES.

[See R. S. O., 1287.]

In the Division Court for the County of .

A. B., Appellant,

v.

C. D., Respondent.

Take notice that I hereby require a jury to be summoned in this appeal.

Dated this day of , A. D. 18 .

A. B., Appellant,
(or C. D., Respondent).

To the Clerk of this Court.

(68.) NOTICE BY CLERK THAT MONEY HAS BEEN PAID INTO COURT.

[See p. 288 ante.]

In the Division Court for the County of

A. B., Plaintiff,

v.

C. D., Defendant.

Take notice that the sum of \$ has this day been paid into Court to your credit in this cause.

Dated this day of , 18 .

Clerk.

To A. B., the Plaintiff (or as the case may be).

(69.) NOTICE OF APPLICATION FOR ORDER TO EXAMINE SICK, AGED, OR INFIRM WITNESS.

[See p. 169 ante.]

In the Division Court of the County of

Between A. B., Plaintiff,

AND

C. D., Defendant.

Take notice, that a motion will be made on behalf of the above named plaintiff (or "defendant") to the Judge of this Court, at his Chambers in the Court House, in the City of Hamilton, (or as the case may be), on the day of , 18 , at o'clock in the forenoon, or so soon thereafter as the motion can be heard, for an order under the 137th section of the Division Courts Act, to examine E. F., of, &c., a material and necessary witness in this cause for the plaintiff (or "defendant"), under the provisions of said section, and that on such motion will be read the affidavits of true copies of which are hereto annexed.

Dated the day of 18 .

(Signature of the party, his Solicitor or Agent.)

To

(Name of party to whom notice given.)

[The application may be made either by notice or summons under Rule No. 184, which came into force on the 1st of January, 1885, Sinclair's D. C. Law, 1885, page 275. Copies of the affidavits, &c., on which the application is founded should be attached to the notice served. On the motion, the applicant should produce an affidavit of service of the notice of motion and of the copies of affidavits, entitled in the Court and cause. In *ex parte* applications, of course, only the papers upon which the motion is made need be produced to the Judge. The writer would recommend, in all cases not of an extreme nature

or of great urgency, that *ex parte* applications should be discouraged. The right of the opposite party to cross-examine at the trial should not be interfered with unless clearly for good cause: *Berdan v. Greenwood*, 20 Ch. D., 764-769. A party takes an *ex parte* order at the risk of having it discharged on good grounds: *Bidder v. Bridges*, 26 Ch. D., 1. An *ex parte* order should not be made for the examination of the applicant: *Price v. Bailey*, 6 P. R., 256. It is very doubtful if the application should in any case be granted for the examination of an expert; See D. C. Act, 1886, 26. The writer sees no reason why the Judge should not, if he deems it necessary, require some general statement of the evidence proposed to be taken, and if it does not appear to be material, to refuse the order: *Langton v. Tate*, 24 Ch. D., 522.]

(70.) SUMMONS TO GARNISHEE AND PRIMARY DEBTOR AFTER JUDGMENT.

[See pp. 202, 211, 212, ante.]

No. A. D. 18 .

[Seal.]

In the Division Court for the County of

Between A. B., *Primary Creditor*,

AND

C. D., *Primary Debtor*,

AND

E. F., *Garnishee*.

Judgment recovered on the day of , A. D. 18 , in the
Division Court in the County of
Amount unsatisfied, \$

You, the above named Garnishee and the Primary Debtor, are hereby summoned to appear at the sittings of this Court, to be held at on the day of , A. D. 18 , (or before the Judge presiding at on the day of , A. D. 18), at of the clock in the forenoon, to state and shew whether or not you, the said Garnishee, owe any, and what debt to the above named Primary Debtor, and why you should not pay the same into Court, to the extent due on the above named judgment, to satisfy the same; and you, the said Primary Debtor and Garnishee, are severally required to take notice, that if any or either of you desire to set up any Statutory or other defence, or any set-off, or to admit any liability of any or either of you, in whole or in part, for the amount claimed in this action, you shall file with the Clerk of this Court the particulars of such defence or set-off or an admission of the amount due or owing, by any or either of you, within eight days after service on you respectively of this summons.

You, or any one interested, may also shew any other cause why the said debt should not go to satisfy the said judgment.

Dated the day of , A. D. 18 .

X. Y., Clerk.

WARNING TO GARNISHEE AND PRIMARY DEBTOR.

To the above named Garnishee and the Primary Debtor :

You, the said Garnishee, are hereby notified, that from and after the time of the service of the summons on you, all debts due and accruing due from you to the above named Primary Debtor are attached, and if you pay the same to any one other than to the person holding the proper order to receive the same, or into Court, you will be liable to repay it, in case the Court or Judge so order.

And you, the said Primary Debtor and Garnishee, are hereby notified that if any or either of you desire to set up any Statutory or other defence, or any set-off, or to admit your or either of your liability, in whole or in part, for the amount claimed herein, you must file with the Clerk of this Court the particulars of such defence or set-off, or an admission of the amount due or owing by any or either of you *within eight days after service on you* respectively of this summons, and that in the absence of notice of such defence or set-off, the Judge in his discretion may give judgment against you for the amount claimed.

[The change in the law in respect to garnishment proceedings effected by the Division Courts Amendment Act, 1886, renders a change in the Forms of Garnishment Summons (as well after as before judgment) necessary. A part of the above Form may seem unnecessary in the case of a summons after judgment, but it was rendered necessary by the language of the 12th section of the Act just quoted (now section 188 of this Act). It will be observed by a reference to that section that the provision as to defence and set-off, &c., whether properly or not, is made applicable to cases both before and after judgment. Until the Board of Judges frame new Forms of Summons and Warning in garnishment cases, the Judge has the power to prescribe Forms of such proceedings in his own Courts, under the 98th section of the Division Courts Act. The foregoing Forms have been prescribed in the County of Wentworth.

(If claim for board or lodging, add Memorandum at p. 203.)

(71.) SUMMONS TO CHANGE THE PLACE OF TRIAL UNDER
SECTION 36.

[See pp. 128 131 ante.]

In the Division Court for the County of .

A. B., Plaintiff,

v.

C. D., Defendant.

Upon reading the affidavit of the defendant, and upon hearing him by his solicitor (or agent), let the above named plaintiff, his solicitor or agent, attend me at my Chambers, at . on the . day after the day of service hereof, at . of the clock in the forenoon of the same day, or at such other

time and place as Chambers may be held, to shew cause why the place of trial of this cause should not by order be changed to the sittings of the Division Court for the County of , pursuant to the 86th section of the Division Courts Act; and why such order should not direct the trial of this cause to be had at the (next) sittings of that Court, to be held on the day of next, subject to all the rights of postponement.

Dated at Chambers this day of A. D. 18 .

Judge.

(72.) ORDER CHANGING THE PLACE OF TRIAL UNDER SECTION 86.

[See pp. 128-131 ante.]

In the Division Court for the County of .

A. B., *Plaintiff*,

v.

C. D., *Defendant*.

Upon reading the affidavit of the defendant herein, and upon hearing the parties by their solicitor (or "agent"),

I do order that the place of trial of this cause be changed to the sittings of the Division Court of the County of , pursuant to the 86th section of the Division Courts Act; and I further order and direct that this cause shall be tried at the (next) sittings of that Court, to be held on the day of next, subject to all rights of postponement.

Dated at Chambers this day of , A. D. 18 .

Judge.

(73.) ORDER TRANSFERRING CAUSE UNDER SECTION 87 WHEN ENTERED IN WRONG COURT.

[See p. 131, ante.]

In the Division Court for the County of .

A. B., *Plaintiff*,

v.

C. D., *Defendant*.

It appearing to me that this cause has been entered in this Court by mistake (or "inadvertence"), I hereby order that all papers and proceedings in this cause be transferred to the Division Court for the County of , in pursuance of section 87 of the Division Courts Act, upon the

terms ["that the defendant shall in no case have taxed against him or pay more costs than if he had been originally sued in such last mentioned Court, and that the plaintiff do pay to the defendant forthwith the sum of \$ as fees for the attendance of himself and his witnesses at this Court," as the case may be, or any other terms the Judge may think proper to impose.]

Dated this day of , 18 .

Judge.

(74.) ORDER STAYING PROCEEDINGS WITH A VIEW TO APPEAL.

[See pp. 179, 180, ante.]

In the Division Court for the County of

A. B., *Plaintiff*,

v.

C. D., *Defendant*.

Upon the application of the plaintiff (or "defendant"), I hereby order that proceedings herein be stayed for ten days from the day of A. D. 18 , in order to afford the plaintiff (or "defendant") time to give the security required in this cause to enable him to appeal; which security I hereby direct to be by a bond in the sum of \$ or the sum of \$ paid into Court.

Dated this day of . A. D. 18 .

Judge.

(75.) ORDER STAYING PROCEEDINGS IN COUNTY COURT WITH A VIEW TO APPEAL.

[See R. S. O., Chap. 47, Sect. 46.]

In the County Court of the County of

A. B., *Plaintiff*,

v.

C. D., *Defendant*.

Upon the application of the plaintiff (or "defendant") I hereby order that proceedings herein be stayed for ten days from the day of A. D. 18 , in order to afford the plaintiff (or "defendant") time to give the security required to enable him to appeal in this cause; which security I hereby direct to be by a bond in the sum of \$ or the sum of \$ paid into Court.

Dated this day of , A. D. 18 .

Judge.

(76.) ORDER FOR JUDGMENT WITHOUT PLAINTIFF FILING NOTE
SUED ON UNDER SECTION 94.

[See p. 135, 136, ante.]

(Court and Cause.)

(Date, &c.)

Upon the application of the plaintiff, and upon reading the affidavit of
, filed, it is ordered that the plaintiff be at liberty to have
judgment entered in his favour in this action without his filing the note sued
on herein, on his filing a true copy thereof with the Clerk of the Court.

Judge.

(77.) ORDER FOR EXAMINATION OF SICK, AGED OR INFIRM
WITNESS, WHERE BOTH PARTIES APPEAR.

[See page 169, ante.]

In the Division Court for the County of

Between A. B., Plaintiff,

AND

Date, &c.

C. D., Defendant.

Upon the application of the above named plaintiff (or "defendant") in
this cause, and upon reading the affidavit of filed herein, notice of this
application and affidavit of service thereof, and a copy of said affidavit of the
said , on the defendant (or "plaintiff") in this cause, and upon
hearing the parties by their solicitors (or "agents"),

It is ordered that G. H., of, &c., do take evidence on oath of E. F., of,
&c., a witness on behalf of the plaintiff (or "defendant"), pursuant to the
137th section of the Division Courts Act, at such time and place as
the said G. H. may by writing appoint, and shall reduce such evidence
to writing, and cause the same to be signed by the said E. F., and when so
signed shall duly transmit the same to the Clerk of this Court.

It is further ordered, that the defendant (or "plaintiff") his solicitor or
agent shall have two days' notice of the time and place of such examination;
that the costs of this order shall be costs in the cause, and that the costs of the
examiner be reserved until after such examination. (Any other terms may be
here inserted.)

Judge.

[Should the application be made *ex parte*, a proceeding to be discouraged,
except in extreme cases: *Berdan v. Greenwood*, 20 Ch. D., 764 769; *Bilder v.
Bridges*, 26 Ch. D. 1, the above Form can easily be adapted to it. The Statute
says nothing about payment to the witness of his expenses of attendance. It
is submitted that before being sworn, he would, if demanded by him, be
entitled to receive the ordinary fees of a witness in the Division Court, and
if out of the County, the fees of a witness in the County Court. See
Smeclair's D. C. Law, 1885, 126.]

(78.) ORDER FOR IMMEDIATE JUDGMENT UNDER SECTION 111.

[See pp. 152, 153, ante.]

In the Division Court for the County of

[Name of Judge] in Chambers.

Between A. B., Plaintiff,

AND

C. D., Defendant.

Upon hearing and upon reading the affidavit of filed,
 and : It is ordered that the Plaintiff be at liberty to have
 the Clerk of this Court, which he is hereby empowered to do, enter final
 judgment for the amount of the plaintiff's debt or money demand sought to be
 recovered in this action, as appears by the particulars of claim endorsed on (or
 "attached to") the special summons herein, with interest, if any, and costs to
 be taxed, and that the costs of this application be

Dated the day of 18 .

Judge.

(79.) ORDER FOR LEAVE TO DEFEND UNCONDITIONALLY UNDER SECTION 111.

[See pp. 152, 153, ante.]

In the Division Court for the County of

[Name of the Judge] in Chambers.

Between A. B., Plaintiff,

AND

C. D., Defendant.

Upon hearing and upon reading the affidavit of filed,
 and : It is ordered that the defendant be at liberty to defend
 this action unconditionally, and that the costs of this application be

Dated the day of 18 .

Judge.

(80.) ORDER FOR LEAVE TO DEFEND ON PAYMENT INTO COURT
UNDER SECTION 111.

[See pp. 152, 153, ante.]

In the Division Court for the County of .

[Name of the Judge] in Chambers.

Between A. B., Plaintiff,

AND

C. D., Defendant.

Upon hearing and upon reading the affidavit of filed,
and : It is ordered that if the defendant pay into Court within
 days from the date of this order the sum of \$, he be at liberty
to defend this action, but if that sum be not so paid, the plaintiff be at liberty
to have the Clerk of this Court, which the Clerk is hereby empowered to do,
enter final judgment for the amount of the plaintiff's debt or money demand
sought to be recovered in this action, as appears by the particulars of claim or
demand endorsed on (or "attached to") the special summons herein, with
interest, if any, and costs, and that in either event the costs of this application
be .

Dated the day of , 18 .

Judge.

(81.) ORDER FOR LEAVE TO DEFEND AS TO PART ON PAYMENT
INTO COURT AND UNCONDITIONALLY AS TO RESIDUE.

[See pp. 152, 153, ante.]

In the Division Court for the County of .

[Name of the Judge] in Chambers.

Between A. B., Plaintiff,

AND

C. D., Defendant.

Upon hearing , and upon reading the affidavit of filed,
and : It is ordered that if the defendant pay into Court within
 days from the date of this order the sum of \$ he be at liberty
to defend this action as to the whole of the plaintiff's claim in this cause, and
it is ordered, that if that sum be not so paid the plaintiff be at liberty to have
the Clerk of this Court forthwith enter judgment for that sum, which the said
Clerk is hereby empowered to do, and the defendant be at liberty to defend
this action as to the residue of the plaintiff's claim; and it is ordered that the
costs of this application be .

Dated the day of 18 .

Judge.

(82.) ORDER FOR THE EXAMINATION OF DEFENDANT UNDER SECTION 111, SUB-SECTION (3), AND FOR PRODUCTION OF BOOKS, ETC.

[See p. 153, ante.]

In the Division Court for the County of .

[Name of the Judge] in Chambers.

Between A. B., Plaintiff,

AND

C. D., Defendant.

Upon hearing and upon reading the affidavit of filed, and : It is ordered that the defendant do (upon payment of the proper charges for conduct money) attend before the Judge of this Court, at his Chambers in the Court House, in the of , on the day of instant, at ten of the clock in the forenoon of the same day, or at such time as Chambers may thereafter be held, and be examined upon oath, and there and then produce any books or documents, or copies of or extracts therefrom, pursuant to the 111th section of the Division Courts Act, and particularly the following: (*here describe them shortly*).

Dated the day of , 18 .

Judge.

[Should the order be for the examination and production before some one else, the above Form can easily be changed.]

(83.) ORDER UNDER SECTION 107, WHERE A THIRD PARTY CLAIMS THE MONEY GARNISHED.

[See p. 217, ante.]

In the Division Court for the County of

Between A. B., Primary Creditor,

AND

C. D., Primary Debtor,

AND

E. F., Garnishee.

Upon reading the summons issued in this cause, and upon hearing the primary creditor [the primary debtor] and the garnishee:

It is ordered that the further hearing of the parties to the said summons herein do stand adjourned until the day of , A. D. 18 , at (or "the next sittings of this Court,") and that G. H., claiming to be entitled to the said debt, the primary creditor, the primary debtor, and the garnishee, their solicitors or agents, attend before the presiding Judge at the next sittings of this Court, at , on the day of , A. D. 18 , at ten

o'clock in the forenoon of the same day (*or such other time as may be appointed*), and state the nature and particulars of their respective claims to such debt, and maintain or relinquish the same, and abide by such order as may by the said presiding Judge be made herein, and therefor that all necessary amendments may be made in the proceedings herein, and that the costs of the adjournment and of this order be costs in the cause.

Dated, etc.

Judge.

[In a case of *Cowan v. Carlill*, 79 Law Times (Journal), 408, it was held that where nothing could be made in execution against a garnishee, the latter could be brought up under the Judicature Act as a "debtor," and examined as to what debts were owing to him and what property or means he had of satisfying the debt.]

(84.) ORDER ON PARTY TO PAY COSTS TO CLERK UNDER SECTION 55.

[See p. 32, ante.]

(Title of Court and Cause.)

Upon reading the summons herein granted on the day of last, (*or "instant"*) the affidavit filed, the affidavit of service thereof, and upon hearing the Clerk of the said Division Court, and the said ("plaintiff" *or as the case may be*; *or "and no cause being shewn"*) I do order that the said do pay to the Clerk of this Court the sum of dollars within days from this date, as the fees which should have been paid by him to the Clerk of the Court on the proceedings herein, and which now remain unpaid, together with the costs of this proceeding.

Dated this day of 18 .

Judge.

(85.) ORDER FOR SUBSTITUTIONAL SERVICE UNDER SECTION 100.

[See p. 139, ante.]

(Court and Cause.)

Upon reading the affidavit of E. F., and upon hearing the plaintiff, by his solicitor (*or "agent"*), I do order that substitutional service of the summons and claim herein, and service of this order, may be made on the defendant by leaving a copy of each with G. H., at the defendant's (last known) residence (*or place of business*), and by sending another copy of each prepaid to the defendant. at (*here state his P. O. address in Ontario, and if he has absconded, his P. O. address elsewhere, if known, and any other terms that the Judge may deem necessary*); and upon such being done, the plaintiff may proceed in this action as if personal action had been effected on the defendant, and that the costs consequent on this order be costs in the cause.

Dated this day of , 18 .

Judge.

(86.) PLEA OF TENDER UNDER SECTION 122.

[See pp. 159, 160, ante.]

In the Division Court for the County of .

A. B., Plaintiff, *

AGAINST

C. D., Defendant.

The defendant, for a plea herein to the plaintiff's claim (or if only to a part of such claim, then specify such part), says that he always was, and still is, ready and willing to pay to the plaintiff the sum of \$, and before action (or if the debt was payable on a day certain, naming that day, or some day anterior to it on which the tender was made), he tendered and offered to pay the same to the plaintiff, and the plaintiff refused to accept it, and the defendant now brings the said sum into Court ready to be paid to the plaintiff.

C. D.

(87.) WARNING ON SUMMONS TO THE DEFENDANT UNDER SECTION 98.

[See p. 138 ante.]

WARNING No. 3.

The defendant is required to take notice that in any case in which an order may be made changing the place of trial, application must be made therefor to the Judge of this Court within eight (or "twelve," as the case may be) days after the day of service thereof.

(88.) WITHDRAWAL OF DEFENCE UNDER SECTION 113.

[See pp. 154, 155, ante.]

(Court and Cause.)

A. B., Plaintiff,

VS.

C. D., Defendant.

I hereby withdraw my defence to this action entered herein, and consent that judgment may be entered against me for the full amount of the plaintiff's claim, (or for such lesser amount as the case may be.)

Dated, &c.

C. D., Defendant.

To E. F., Clerk of the Court.

[On receipt of this notice by the Clerk of the Court he should forthwith notify the plaintiff by mail: Sinclair's D. C. Law, 1885, pages 19 and 20.]

Judge.

Upon the Clerk's mailing this notice to the plaintiff the latter would be entitled to have judgment entered by the Clerk, as by default for the amount admitted to be due, together with the costs necessarily incurred. If a lesser sum than the amount claimed by the plaintiff is admitted by the defendant, the plaintiff must determine whether he will accept judgment for that sum or proceed to recover a greater sum at the sittings. If he consents to accept the amount admitted he could not afterwards recover any further sum which he had claimed, unless the terms of the consent did not preclude him from doing so. Should the defendant dispute part only of the plaintiff's claim (Sinclair's D. C. Act, 1879, 100) his withdrawal of defence under this section and consent to judgment would apparently entitle the plaintiff to judgment for the full amount claimed and costs.

(89.) PLEA OF PAYMENT INTO COURT UNDER SECTION 125.

[See p. 162 ante.]

(Court and Cause.)

The defendant brings into Court the sum of \$, and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

Dated day of , 18 .

Yours, &c.,

A. B.,

To C. D.,

The Plaintiff.

The Defendant.

[If pleaded only as to part of the claim, say "as to \$ parcel of the money claimed."]

R. S. O. CHAPTER 61.

An Act Respecting Witnesses and Evidence.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. This Act may be cited as "*The Evidence Act*," R. S. O., Short title 1877, c. 62, s. 1.

COMPETENCY OF WITNESSES.

2. No person offered as a witness shall hereafter be excluded by reason of any alleged incapacity from crime or interest from giving evidence, according to the practice of the Court, on the trial of any action, issue, matter or proceeding, in any Court of Ontario, or before any person having, by law or by consent of parties, authority to hear, receive and examine evidence. R. S. O. 1877, c. 62, s. 2.

3. Every person so offered shall be admitted to give evidence notwithstanding that such person has an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the action or proceeding in which he is offered as a witness, and notwithstanding that such person has been previously convicted of any crime or offence. R. S. O. 1877, c. 62, s. 3.

4. On the trial of any action, issue, matter or proceeding in any Court in this Province, or before any person having, by law or by consent of parties, authority to hear, receive and examine evidence, the parties to the proceedings, and the persons in whose behalf the action or other proceeding, is brought or instituted, or opposed, or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, according to the practice of the Court, on behalf of themselves or of either or any of the parties to the action or proceeding; and the husbands and wives of such parties and persons shall, except as hereinafter excepted, be competent and compellable to give evidence, according to the practice of the Court, on behalf of either or any of the parties to the action or proceeding. R. S. O. 1877, c. 62, s. 4.

5. Nothing herein contained shall render any person compellable to answer any question tending to criminate himself or to subject him to prosecution for any penalty. R. S. O. 1877, c. 62, s. 5.

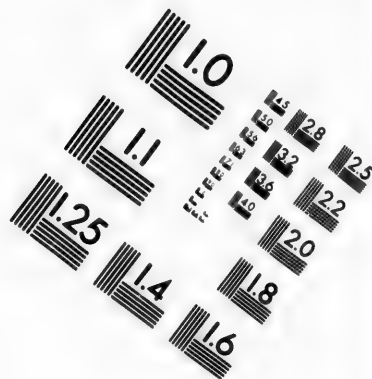
Witnesses not to be incapacitated by crime or interest.

Such persons admitted to give evidence.

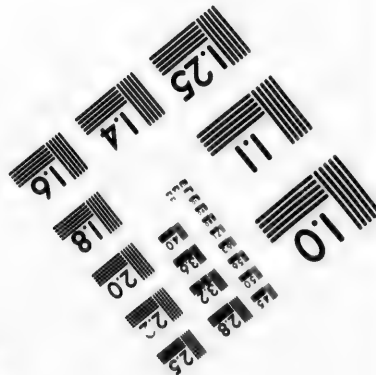
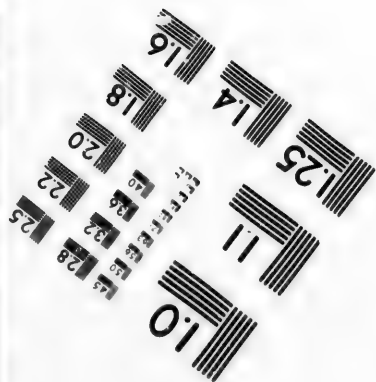
Evidence of parties.

Evidence of husband and wife.

Questions tending to criminate need not be answered.



6"



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Evidence in actions for breach of promise.

6. The parties to an action for breach of promise of marriage shall be competent to give evidence in the action: Provided always that no plaintiff in an action for breach of promise of marriage shall recover a verdict unless his or her testimony is corroborated by some other material evidence in support of the promise. 45 V. c. 10, s. 3.

Evidence in proceedings in consequence of adultery.

7. The parties to a proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in the proceeding: Provided that in such case the husband or wife, if competent only under and by virtue of this Act, shall not be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless he or she shall have already given evidence in the same proceeding in disproof of his or her alleged adultery. 45 V. c. 10, s. 4.

Communications made during marriage.

8. No husband shall be compellable to disclose any communication made by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage. R. S. O. 1877, c. 62, s. 8.

Evidence in trials under Acts of Ontario.

9. On the trial of any proceeding, matter or question, under any Act of the Legislature of Ontario, or on the trial of any proceeding, matter or question before any Justice of the Peace, Mayor, or Police Magistrate, in any matter cognizable by such Justice, Mayor, or Police Magistrate, not being a crime, the party opposing or defending, or the wife or husband of the person opposing or defending, shall be competent and compellable to give evidence therein. R. S. O. 1877, c. 62, s. 9.

In actions by or against executors, administrators, or assigns of a deceased person, the evidence of the opposite party must be corroborated.

10. In any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R. S. O. 1877, c. 62, s. 10.

In actions by or against lunatics, etc., evidence of opposite party to be corroborated.

11. In any action or proceeding by or against a person found by inquisition to be of unsound mind, or being an inmate of a lunatic asylum, an opposite or interested party shall not obtain a verdict, judgment, or decision therein, on his own evidence, unless such evidence is corroborated by some other material evidence. R. S. O. 1877, c. 62, s. 11.

AFFIRMATIONS.

Quakers, Menonists, Tunkers, etc., permitted to make affirmation.

12. In any case in which an oath, declaration or affirmation is required by law, or upon any lawful occasion whatever on which the oath of any person is by law admissible, a Quaker, Menonist or Tunker, or a member of the church known as the "Unitas Fratrum," or the United Brethren, sometimes called the Moravian Church, having first made the following declaration, or affirmation, viz.:

"I, A. B., do solemnly, sincerely and truly declare and affirm that I am one of the Society called Quakers, Menonists, Menonists or Unitas Fratrum or Moravians" (*as the case may be*);

may make his affirmation or declaration in the form following, that is to say:

"I, A. B., do solemnly, sincerely and truly affirm and declare," &c. ;

and such affirmation or declaration shall have the same force and effect to all intents and purposes, in all Courts and all other places, as an oath taken in the usual form. R. S. O. 1877, c. 62, s. 12.

13. If a person called as a witness, or required or desiring to make an affidavit or deposition in a proceeding, or on an occasion whereon or touching a matter respecting which an oath is required, whether on taking office or otherwise, refuses or is unwilling, from alleged conscientious motives, to be sworn, the Court or Judge, or other presiding officer, or person qualified to take affidavits or depositions, may permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, viz :

"I, A. B., do solemnly, sincerely and truly affirm and declare that the taking of an oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely and truly affirm and declare," &c.:

which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form. R. S. O. 1877, c. 62, s. 13.

14. (1) If in a Court of Justice, a person called to give evidence objects to take an oath, or is objected to as incompetent to take an oath, such person shall, if the presiding Judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise, affirmation, and declaration :

"I solemnly promise, affirm, and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth."

And upon the person making such solemn affirmation and declaration, his evidence shall be taken in the said proceeding. 45 V. c. 10, s. 5.

(2) The words "Court of Justice" and the words "presiding Judge" in this section shall be deemed to include any person having by law authority to administer an oath for the taking of evidence. 45 V. c. 10, s. 2.

15. Every person authorized or required to administer an oath for any purpose may administer any affirmation or declaration as aforesaid. R. S. O. 1877, c. 62, s. 14.

Certain persons may make affirmation or declaration instead of oath.

Persons who object or are incompetent to take an oath to be allowed to make a declaration.

Persons authorized to administer oaths may administer affirmation.

SUBPÆNAS.

A party to any action may be summoned as a witness by the opposite party, and consequences of non-attendance.

16. Where a party in an action desires to call the opposite party as a witness at the trial, he shall either subpoena such party or give to him or his solicitor at least eight days' notice of the intention to examine him as a witness in the cause, and if such party does not attend on the notice or subpoena, his non-attendance shall be taken as an admission *pro confesso* against him in the action, unless otherwise ordered by the Judge, and a general finding and judgment may be had against the party thereon or the plaintiff may be non-suited, or the proceedings in the action may be postponed by the Judge, on such terms as he sees fit to impose. R. S. O. 1877, c. 62, s. 18.

ISSUE OF SUBPÆNAS INTO ANY PART OF ONTARIO AND QUEBEC.

[Sections 4-11 and 13 of C. S. C. c. 79, are as follows :

Courts may issue subpoenas to any part of Canada.

4. If in any action or suit depending in any of Her Majesty's Superior Courts of Law or Equity in Canada, it appears to the Court, or when not sitting, it appears to any Judge of the Court, that it is proper to compel the personal attendance at any trial, or *enquete* or examination of witnesses, of any person who may not be within the jurisdiction of the Court in which the action or suit is pending, the Court or Judge, in their or his discretion, may order that a writ called a writ of *subpœna ad testificandum* or of *subpœna duces tecum* shall issue in special form, commanding such person to attend as a witness at such trial or *enquete* or examination of witnesses wherever he may be in Canada. 18 V. c. 9, s. 1.

Service thereof in any part of Canada to be good.

5. The service of any such writ or process in any part of Canada shall be as valid and effectual, to all intents and purposes, as if the same had been served within the jurisdiction of the Court from which it has issued, according to the practice of such Court. 18 V. c. 9, s. 1.

When not to be issued.

6. No such writ shall be issued in any case in which an action is pending for the same cause of action, in that section of the Province, whether Upper or Lower Canada respectively, within which such witness or witnesses may reside. 18 V. c. 9, s. 1.

Writs to be specially noted.

7. Every such writ shall have at the foot, or in the margin thereof, a statement or notice that the same is issued by the special order of the Court or Judge making such order and no such writ shall issue without such special order. 18 V. c. 9, s. 2.

Consequences of disobedience.

8. In case any person so served does not appear according to the exigency of such writ or process, the Court out of which the same issued may, upon proof made of the service thereof, and of such default, to the satisfaction of such Court, transmit a certificate of such default, under the seal of the same Court, to any of her Majesty's Superior Courts of Law or Equity in that part of Canada in which the person so served may reside, being out of the jurisdiction of the Court transmitting such certificate, and the Court to which such certificate is sent, shall thereupon proceed against and punish such person so having made default, in like manner as they might have done if such person had neglected or refused to appear to a writ of subpoena or other similar process issued out of such last mentioned Court. 18 V. c. 9, s. 3.

9. No such certificate of default shall be transmitted by any Court, nor shall any person be punished for neglect or refusal to attend any trial or *enquete* or examination of witnesses, in obedience to any such subpoena or other similar process, unless it be made to appear to the Court transmitting and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, according to the rate *per diem* and per mile allowed to witness by the law and practice of the Superior Courts of Law within the jurisdiction of which such person was found, to defray the expenses of coming and attending to give evidence and of returning from giving evidence, had been tendered to such person at the time when the writ of subpoena, or other similar process, was served upon him. 18 V. c. 9, s. 3.

10. The service of such writs of subpoena or other similar process in Lower Canada, shall be proved by the certificate of a Bailiff within the jurisdiction where the service has been made, under his oath of office, and such service in Upper Canada by the affidavit of service endorsed on or annexed to such writ by the person who served the same. 18 V. c. 9, s. 3.

11. The costs of the attendance of any such witness shall not be taxed against the adverse party to such suit, beyond the amount that would have been allowed on a commission *rogatoire*, or to examine witnesses, unless the Court or Judge before whom such trial or *enquete* or examination of witnesses is had, so orders. 18 V. c. 9, s. 4.

13. Nothing herein contained shall affect the power of any Court to issue a commission for the examination of witnesses out of its jurisdiction, nor affect the admissibility of any evidence at any trial or proceeding, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the Court. 18 V. c. 9, ss. 6, 7.]

EXAMINATION OF WITNESSES.

17. Upon the trial of any cause a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without the writing being shewn to him; but if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and the Judge at any time during the trial, may require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he thinks fit. R. S. O. 1877, c. 62, s. 24.

18. If a witness upon cross-examination as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement. R. S. O. 1877, c. 62, s. 25.

Proof of previous conviction of a witness may be given if he denies it, etc.

19.—(1) A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove the conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the offence, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court at which the offender was convicted, or by the deputy of the clerk or officer, shall, upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Fee.

(2) For such certificate a fee of \$1 and no more may be demanded or taken. R. S. O. 1877, c. 62, s. 26.

How far a party may discredit his own witness.

20. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but in case the witness, in the opinion of the Judge, proves adverse, such party may contradict him by other evidence, or by leave of the Judge, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he did make such statement. R. S. O. 1877, c. 62, s. 27.

PUBLIC AND OTHER DOCUMENTS.

Official Documents.

Ontario Orders in Council, etc., printed by Queen's Printer and published with Statutes, to be *prima facie* evidence.

21. A copy of an Order in Council purporting to be made by the Lieutenant-Governor or Administrator of the Government of Ontario, and a copy of a departmental or other regulation purporting to be made by the said Lieutenant-Governor or Administrator in Council, or by any other person or persons authorized by law to make such regulation, purporting to be printed by the Queen's Printer at Toronto, and published with the Statutes of Ontario, shall be received in any Court as *prima facie* evidence of the tenor of the order or regulation. 48 V. c. 13, s. 9.

Dominion Orders in Council, etc., printed by Queen's Printer and published with Statutes, to be *prima facie* evidence.

22. A copy of an Order in Council purporting to be made by the Governor-General of Canada, or his deputy, or other Chief Executive Officer or Administrator of the Government of Canada, or a copy of a departmental or other regulation made by the said Governor-General or his deputy, or other Chief Executive Officer or Administrator of the Government of Canada, or by any other person or persons authorized by law to make such regulation, purporting to be printed by the Queen's Printer at Ottawa, and published with the Statutes of Canada by the said Queen's Printer shall be received in any Court as *prima facie* evidence of the tenor of the order or regulation. 48 V. c. 13, s. 10.

23. In every case in which the original record could be received in evidence, a copy of any official or public document in this Province, purporting to be certified under the hand of the proper officer, or person in whose custody such official or public document is placed, or a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any corporation, created by charter or statute in this Province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer or secretary thereof, shall be receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof. R. S. O. 1877, c. 62, s. 28.

24. Where documents are in the official possession, custody or power of a member of the Executive Council, or the Head of a Department of the Public Service of this Province, if the Deputy head or other officer of the Department has the documents in his personal possession, and is called as a witness, he shall be entitled, acting herein by the direction and on behalf of such member of the Executive Council or Head of the Department, to object to produce the documents on the ground that they are privileged; and such objection may be taken by him in the same manner, and shall have the same effect, as if such member of the Executive Council or Head of the Department were personally present and made the objection. 49 V. c. 16, s. 16.

25. (1) Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other statute exists which renders its contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any Court of justice, or before a person having by law or by consent of parties, authority to hear, receive and examine evidence, provided it be proved that it is an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original has been entrusted.

(2) Such officer shall furnish such certified copy or extract to any person applying for the same at a reasonable time, upon his paying therefor a sum not exceeding ten cents for every folio of one hundred words. R. S. O. 1877, c. 62, s. 29.

Certain Statutes.

26. Any copy of the Statutes and Ordinances of the late Province of Lower Canada, printed and published by the printer duly authorized to print and publish the same by Her Majesty, or by any of Her Royal Predecessors, shall be received as conclusive evidence of the several Statutes made and enacted prior to the Union

of the Provinces of Upper and Lower Canada by the Legislature of the Province of Lower Canada, and of the tenor of such Statutes and Ordinances, in any Court of civil jurisdiction in Ontario. R. S. O. 1877, c. 62, s. 37.

[C. S. C. c. 5, s. 14 (1), also enacts that a similar copy shall be conclusive evidence of such Statutes and Ordinances in Courts of criminal jurisdiction in Ontario.]

Signatures of Judges.

Judicial notice
to be taken of
signatures of
Judges, etc.

27. All Courts, Judges, Justices, Masters, Clerks of Courts, Commissioners judicially acting, and other judicial officers in this Province, shall take judicial notice of the signature of any of the Judges of the Supreme Court of Canada, the Court of Appeal, the High Court of Justice, the County Courts of Ontario, or the Superior or Circuit Courts in Quebec, where such signature is appended or attached to any decree, order, certificate, affidavit, or judicial or official document. R. S. O. 1877, c. 62, s. 30.

Foreign Judgments.

Foreign judgments, etc.,
how proved.

28. Any judgment, decree or other judicial proceeding recovered, made, had or taken in the Supreme Court of Judicature in England or Ireland or in any of the Superior Courts of Law, Equity or Bankruptcy in Scotland, or in any Court of Record in any of the Provinces of Canada, or in any British Colony or Possession, or in any Court of Record of the United States or of any State of the United States of America, may be proved in any action or proceeding in Ontario, in which proof of such judgment, decree or judicial proceeding may be necessary or required, by an exemplification of the same under the seal of the Court without any proof of the authenticity of such seal or other proof whatever, in the same manner as any judgment, decree, or similar judicial proceeding of the High Court in Ontario may be proved by an exemplification thereof in any judicial or other proceeding in the said Court. R. S. O. 1877, c. 62, s. 31; 43 V. c. 7, s. 1.

Notarial Documents.

Notarial acts
in Quebec ad-
missible.

29. A copy of a notarial act or instrument in writing made in Quebec, before a Notary, filed, enrolled or enregistered by such Notary, and certified by a Notary or Prothonotary to be a true copy of the original thereby certified to be in his possession as such Notary or Prothonotary, shall be receivable in evidence in any judicial or other proceeding in Ontario in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved. R. S. O. 1877, c. 62, s. 32.

How impeach-
ed.

30. Such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of Quebec, be taken before a Notary, or be filed, enrolled or enregistered by a Notary in Quebec. R. S. O. 1877, c. 62, s. 33.

Protests of Bills and Notes.

31. All protests of bills of exchange and promissory notes shall be received in all Courts as *prima facie* evidence of the allegations and facts therein contained. R. S. O. 1877, c. 62, s. 34. *Protests prima facie evidence.*

32. Any note, memorandum or certificate at any time made by one or more Notaries Public either in Ontario or Quebec, in his own handwriting or signed by him at the foot of or embodied in any protest, or in a regular register of official acts kept by him shall be *prima facie* evidence in Ontario of the fact of notice of non-acceptance or non-payment of a promissory note or bill of exchange having been sent or delivered, at the time and in the manner stated in such note, certificate or memorandum. R. S. O. 1877, c. 62, s. 35. *Certificate of notaries to be prima facie evidence.*

33. The production of a protest on a promissory note or bill of exchange, under the hand or seal of one or more Notaries Public, either in Ontario or Quebec, in any Court in Ontario, shall be *prima facie* evidence of the making of such protest. R. S. O. 1877, c. 62, s. 36. *Production of protest to be prima facie evidence that protest was made.*

Affidavits, etc., made out of Ontario.

34. Oaths, affidavits, affirmations or declarations administered, sworn, affirmed or made out of the Province of Ontario, before some one of the following persons : *Affidavits to be used in Ontario may be made before certain functionaries in the United Kingdom or foreign parts.*

A Commissioner authorized to administer oaths in the Supreme Court of Judicature in England or Ireland ;

A Judge of the Supreme Court of Judicature in England or Ireland ;

A Judge of the Court of Session or the Justiciary Court in Scotland ;

A Judge of any of the County Courts of Great Britain or Ireland, within his County ;

A Notary Public, certified under his hand and official seal ;

The Mayor or Chief Magistrate of any City, Borough or Town corporate, in Great Britain or Ireland, or in any Colony of Her Majesty, or in any foreign country, and certified under the common seal of such City, Borough, or Town corporate ;

A Judge of any Court of Record or of supreme jurisdiction in any Colony belonging to the Crown of Great Britain, or any dependency thereof, or in any foreign country ;

Or, if made in the British Possessions in India, before any Magistrate or Collector certified to have been such under the hand of the Governor of such Possession ;

Or, if made in Quebec, before a Judge or Prothonotary of the Superior Court or Clerk of the Circuit Court ;

Or before any Consul, Vice-Consul, or Consular Agent of Her Majesty exercising his functions in any foreign place ;

Or before a Commissioner authorized by the laws of Ontario to take affidavits in and for any of the Courts of Record of the Province ;

for the purposes of and in or concerning any cause, matter or thing depending or in any wise concerning any proceedings in any Courts in this Province, shall be as valid and effectual and shall be of like force and effect to all intents and purposes as if such oath, affidavit, affirmation or declaration had been administered, sworn, affirmed or made in this Province before a Commissioner for taking affidavits therein, or other competent authority of the like nature. R. S. O. 1877, c. 62, s. 38; 50 V. c. 8; Sched.

Seal and signature need not be proved.

35. Any document purporting to have affixed, impressed or subscribed thereon or thereto the signature of such Commissioner, or the signature and official seal of such Notary Public, or Prothonotary, or the seal of the Corporation, and the signature of such Mayor or Chief Magistrate or Governor as aforesaid, or the seal and signature of such Judge, Consul, Vice-Consul or Consular Agent in testimony of such oath, affidavit, affirmation or declaration having been administered, sworn, affirmed or made by or before him, shall be admitted in evidence without proof of such signature, or seal and signature, being the signature or the seal and signature of the person whose signature or seal and signature the same purport to be, or of the official character of such person. R. S. O. 1877, c. 62, s. 39.

Formal Defects in Affidavits.

Informal headings, etc., not to invalidate.

36. No informality in the heading, or other formal requisites to any affidavit, declaration or affirmation, made or taken before a Commissioner or other person authorized to take affidavits under *The Act respecting Commissioners for taking Affidavits and Recognizances* or under this Act, shall be any objection to its reception in evidence, if the Court or Judge before whom it is tendered thinks proper to receive it. R. S. O. 1877, c. 62, s. 40.

Rev. Stat. c. 62.

Depositions.

Copies of depositions certified by person taking the same admissible in evidence.

37. Where an examination of a party or witness has been taken before a Judge or other officer or person appointed to take the same, copies of the examinations and depositions certified under the hand of the Judge, officer or other person taken the same, shall, without proof of the signature, be received and read in evidence, saving all just exceptions. 42 V. c. 15, s. 3.

Proof of Wills.

In actions concerning real estate, probate, etc., to be *prima facie* evidence of will, etc., after certain notice, save where its validity is put in issue

38. In any action where it is necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, the party intending to establish in proof the devise or other testamentary disposition, may give notice to the opposite party ten days at least before the trial or other proceeding in which the proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition, the probate of the will or letters of administration with the will annexed, or a copy

thereof, stamped with the seal of the Surrogate Court granting the same, or with the seal of the Court of Chancery, where the probate or letters of administration were granted by the former Court of Probate for Upper Canada; and in every such case the probate or letters of administration or copy thereof, respectively stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, under *The Surrogate Courts Act*, unless the party receiving the notice within four days after the receipt, gives notice that he disputes the validity of the devise or other testamentary disposition. R. S. O. 1877, c. 62, s. 41.

39. In every case in which in such action the original will is produced and proved, the Court or Judge before whom such evidence is given may direct by which of the parties the costs thereof shall be paid. As to costs of proving a will in an action. R. S. O. 1877, c. 62, s. 42.

40. In case of the death of a person in any of Her Majesty's possessions out of Ontario, after having made a will sufficient to pass real estate in Ontario, and whereby such estate has been devised, charged or affected, and in case such will has been duly proved in any Court having the proof and issuing probate of wills in any of such possessions, and remains filed in such Court, then in case notice of the intention to use such probate or certificate in the place of the original will, is given to the opposite party in such proceeding one month before the same is to be so used, the production of the probate of the will, or a certificate of the Judge, Registrar or Clerk of such Court, that the original is filed and remains in the Court, and purports to have been executed before two witnesses, shall in any proceeding in any Court in Ontario, concerning such real estate, be sufficient *prima facie* evidence of the will and the contents thereof, and of the same having been executed so as to pass real estate, without the production of the original will; but the probate or certificate shall not be used if, upon cause shewn before such Court, or a Judge thereof, the Court or Judge finds reason to doubt the sufficiency of the execution of the will to pass such real estate as aforesaid, and makes a rule or order disallowing the production of the probate. R. S. O. 1877, c. 62, s. 43.

41. The production of the certificate, in the last preceding section mentioned, shall be sufficient *prima facie* evidence of the facts therein stated, and of the authority of the Judge, Registrar or Clerk, without proof of his appointment, authority or signature. Certificate to be *prima facie* evidence. R. S. O. 1877, c. 62, s. 44.

Copies of Registered Instruments.

42. The word "instrument" in the next succeeding three sections shall have the meaning assigned to the word "instrument" in section 2 of *The Registry Act*. Meaning of "instrument." Rev. Stat. c. 114, s. 2. R. S. O. 1877, c. 62, s. 47.

Registered instrument *prima facie* evidence.

43. An exemplification or a certified copy of any registered instrument or memorial under the hand and seal of office of the Registrar in whose office the same is registered shall be received as *prima facie* evidence, in every Court in Ontario, of the original of the instrument or memorial, except in the cases provided for in section 45. R. S. O. 1877, c. 62, s. 45. See also cap. 114, s. 24.

Instrument with certificate of registration *prima facie* evidence.

44. In case one of two or more original parts of any instrument is registered, the Registrar shall indorse upon each of such original parts, a certificate of the registration in the form of Schedule G to *The Registry Act*, and such original so certified shall be received as *prima facie* evidence of the registration and of the due execution of the same. R. S. O. 1877, c. 111, s. 56.

Rev Stat. c. 114.

Certified copies of registered instruments may be used instead of originals after notice.

45. In any action where it would be necessary to produce and prove an original instrument which has been registered in order to establish such instrument and the contents thereof, the party intending to prove such original instrument may give notice to the opposite party ten days at least before the trial, or other proceeding in which the said proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence, as proof of the original instrument, a copy thereof certified by the Registrar, under his hand and seal of office, and in every such case the copy so certified shall be sufficient evidence of the original instrument, and of its validity and contents, unless the party receiving the notice within four days after such receipt, gives notice that he disputes the validity of the original instrument, in which case the costs of producing and proving the original may be ordered by the Court or Judge to be paid by any or either of the parties as may be deemed right. R. S. O. 1877, c. 62, s. 46.

Exception.

Costs in such cases.

Copies of other written Instruments.

Copies of certain documents may be admitted as evidence on certain conditions.

46.—(1) In any action, or proceeding, in the cases of telegrams, letters, shipping bills, bills of lading, delivery orders, receipts, accounts and other written instruments used in business and other transactions, where it is necessary to prove the original document, the party intending to prove the original may give notice to the opposite party ten days at least before the trial or other proceeding in which the said proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence as proof of the contents, an instrument purporting to be a copy of the document.

Proviso.

(2) Such copy may then be inspected by the opposite party at some convenient time and place; and in every such case the copy shall without further proof be sufficient evidence of the contents of the original document, and be accepted and taken in lieu of the original, unless the party receiving the notice within four days after the time mentioned therein for such inspection gives notice that he intends to dispute the correctness or genuineness of the copy at the

said trial or proceeding, and to require proof of the original; and the Court or Judge, before whom the question is raised may direct by which of the parties the costs which may thereupon attend any production or proof of the original document according to the rules of evidence heretofore existing, shall be paid. R. S. O. 1877, c. 62, s. 48.

MISCELLANEOUS PROVISIONS.

47.—(1) Where upon application for this purpose, it is made to appear to the High Court or a Judge thereof, or to a County Court Judge in this Province, that any Court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, the obtaining the testimony in or in relation to any action, suit or proceeding pending in or before such foreign Court or tribunal, of any witnesses out of the jurisdiction thereof and within the jurisdiction of the Court or Judge so applied to, such Court or Judge may order the examination before the person appointed, and in a manner and form directed, by the commission, order or other process of such witnesses accordingly; and may by the same order, or a subsequent order, command the attendance of any persons named therein for the purpose of being examined, or the production of any writings or other documents mentioned in the order; and give all such directions as to the time, place and manner of the examination, and all other matters connected therewith as may appear reasonable and just; and the order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by the same Court or Judge in a cause depending in such Court or before such Judge.

Witnesses may be ordered to be examined in relation to an matter pending before a foreign tribunal.

(2) Every person whose attendance is so ordered shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in the High Court.

Payment of expenses of witness.

(3) Every person examined under such commission or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and any other questions which, in a case pending in the Court by which or by a Judge whereof or before the Judge by whom the order for examination was made, the witness would be entitled to refuse to answer; and no person shall be compelled to produce at the examination, any writing or document which he would not be compellable to produce at the trial of such a cause.

Right of Refusal to answer questions and to produce documents.

(4) Where the commission directs, or the instructions of the Court accompanying the same, direct that the person to be examined shall be sworn or shall affirm before the commissioner or other person, the commissioner or other person shall have authority to administer an oath or affirmation to the person to be examined as aforesaid. 47 V. c. 10, s. 12.

Administration of oath

Evidence in actions where in any person resident in Great Britain is a party.

48. In an action or other proceeding relating to any debt or account (other than an action by or on behalf of Her Majesty), wherein a person residing in Great Britain is a party, the evidence and examination of witnesses on behalf of either or any of the parties to the action or proceeding, shall be the same, and given in the same manner as in other actions or proceedings according to the practice of the Court. 45 V. c. 10, s. 6.

Evidence in actions.

Rev. Stat. c. 112, s. 1.

49. It shall not be necessary in an action to produce any evidence which by section 1 of *The Act to Amend the Law of Vendor and Purchaser and to Simplify Titles*, is dispensed with as between vendor and purchaser; and the evidence therein declared to be sufficient as between vendor and purchaser shall be *prima facie* sufficient for the purposes of such action. R. S. O. 1877, c. 62, s. 49.

Attending witness need not be called where none was required by law.

50. It shall not be necessary to prove by the attesting witness, any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto. R. S. O. 1877, c. 62, s. 50.

Comparison of disputed writing with genuine.

51. Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same, may be submitted to the Court and jury, as evidence of the genuineness or otherwise of the writing in dispute. R. S. O. 1877, c. 62, s. 51.

When instruments offered in evidence may be impounded.

52. Where a document is received in evidence by virtue of this Act, the Court, Judge, Commissioner or other person acting or officiating judicially, who admits the same, may, direct the same to be impounded and kept in the custody of an officer of the Court, or other person, for such period and subject to such conditions as to the Court or person who admits the document seems meet, or until further order touching the same has been made either by such Court or by the Court to which the officer belongs, or by the person or persons who constituted such Court, or by some one of the Judges of the High Court or a County Court (as the case may be), on application made for that purpose. R. S. O. 1877, c. 62, s. 52.

R. S. O. CHAPTER 125.

An Act respecting Mortgages and Sales of
Personal Property.

HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of the Province of Ontario, enacts as
follows:—

REGISTRATION OF CHATTEL MORTGAGES AND SALES OF GOODS WHERE
POSSESSION IS UNCHANGED.

1. Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, made in Ontario, which is not accompanied by an immediate delivery, and an actual and continued change of possession of the things mortgaged, or a true copy thereof, shall, within five days from the execution thereof be registered as hereinafter provided, together with the affidavit of a witness thereto, of the due execution of such mortgage or conveyance, or of the due execution of the mortgage or conveyance of which the copy filed purports to be a copy, and also with the affidavit of the mortgagee or of one of several mortgagees, or of the agent of the mortgagee or mortgagees, if such agent is aware of all the circumstances connected therewith and is properly authorized in writing to take such mortgage (in which case a copy of such authority shall be registered therewith.)
R. S. O. 1877, c. 119, s. 1.

2. Such last mentioned affidavit, whether of the mortgagee or his agent, shall state that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him.
R. S. O. 1877, c. 119, s. 2.

3. Every such mortgage or conveyance shall operate and take effect upon, from and after the day and time of the execution thereof.
R. S. O. 1877, c. 119, s. 3.

4. In case such mortgage or conveyance and affidavits are not registered as hereinbefore provided, the mortgage or conveyance shall be absolutely null and void as against creditors of the mort-

Mortgages of goods not attended with change of possession, shall be registered, or else be void as against creditors, etc., of the mortgagor, with an affidavit, etc.

Contents of affidavit.

When mortgage to take effect.

Unless registered, mortgage void.

gagor and against subsequent purchasers or mortgagees in good faith for valuable consideration. R. S. O. 1877, c. 119, s. 4.

Sales of good not attended with delivery shall be registered, or else be void as against creditors, etc., of the vendor.

5. Every sale of goods and chattels, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of this Act, and shall be accompanied by an affidavit of a witness thereto of the due execution thereof, and an affidavit of the bargainee, or his agent duly authorized in writing to take the conveyance a copy of which authority shall be attached to the conveyance, that the sale is *bona fide* and for good consideration, as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, and the conveyance and affidavits shall be registered as hereinafter provided, within five days from the executing thereof, otherwise the sale shall be absolutely void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith. R. S. O. 1877, c. 119, s. 5.

Mortgages of goods to secure advances or to indemnify endorsers, etc., to be valid if duly registered.

6. In case of an agreement in writing for future advances for the purpose of enabling the borrower to enter into and carry on business with such advances, the time of repayment thereof not being longer than one year from the making of the agreement, and in case of a mortgage of goods and chattels for securing the mortgagee repayment of such advances, or in case of a mortgage of goods and chattels for securing the mortgagee against the endorsement of any bills or promissory notes or any other liability by him incurred for the mortgagor, not extending for a longer period than one year from the date of the mortgage, and in case the mortgage is executed in good faith, and sets forth fully by recital or otherwise, the terms, nature and effect of the agreement, and the amount of liability intended to be created, and in case the mortgage is accompanied by the affidavit of a witness thereto of the due execution thereof, and by the affidavit of the mortgagee, or in case the agreement has been entered into and the mortgage taken by an agent duly authorized in writing to make such agreement and to take such mortgage, and if the agent is aware of the circumstances connected therewith, then, if accompanied by the affidavit of such agent, such affidavit, whether of the mortgagee or his agent, stating that the mortgage truly sets forth the agreement entered into between the parties thereto, and truly states the extent of the liability intended to be created by the agreement and covered by such mortgage, and that the mortgage is executed in good faith and for the express purpose of securing the mortgagee repayment of his advances or against the payment of the amount of his liability for the mortgagor, as the case may be, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor, nor to prevent such

creditors from recovering any claims which they may have against the mortgagor, and in case the mortgage is registered as hereinafter provided, the same shall be as valid and binding as mortgages mentioned in the preceding sections of this Act. R. S. O. 1877, c. 119, s. 6.

7. The affidavit of *bona fides* required by the preceding two sections may be made by one of two or more bargainees or mortgagages. 41 V. c. 8, s. 12, *part*. Affidavit under ss. 5 and 6.

8. The instruments mentioned in the preceding sections shall be registered in the office of the Clerk of the County Court of the county or union of counties where the property so mortgaged or sold is at the time of the execution of such instrument; and such clerks shall file all such instruments presented to them respectively for that purpose, and shall endorse thereon the time of receiving the same in their respective offices, and the same shall be kept there for the inspection of all persons interested therein, or intending or desiring to acquire any interest in all or any portion of the property covered thereby. R. S. O. 1877, c. 119, s. 7; 43 V. c. 15, s. 1. Chattel mortgages to be registered in the office of the County Clerk.

[As to registration of Chattel Mortgages in Haliburton, see Cap. 6, s. 23.]

9. The said clerks respectively shall number every such instrument or copy filed in their offices, and shall enter in alphabetical order in books to be provided by them, the names of all the parties to such instruments, with the numbers endorsed thereon opposite to each name, and such entry shall be repeated alphabetically under the name of every party thereto. R. S. O. 1877, c. 119, s. 8. Clerk to enter the same.

10. In the event of the permanent removal of goods and chattels mortgaged as aforesaid from the county or union of counties in which they were at the time of the execution of the mortgage, to another county or union of counties before the payment and discharge of the mortgage, a certified copy of the mortgage, under the hand of the clerk of the County Court in whose office it was first registered, and under the seal of the Court, and of the affidavits and documents and instruments relating thereto filed in such office, shall be filed with the clerk of the County Court of the county or union of counties to which the goods and chattels are removed, within two months from such removal, otherwise the said goods and chattels shall be liable to seizure and sale under execution, and in such case the mortgage shall be null and void as against subsequent purchasers and mortgagees in good faith for valuable consideration as if never executed. R. S. O. 1877, c. 119, s. 9. How to proceed if goods mortgaged are removed to another County.

RENEWAL OF MORTGAGES.

Statement to be filed yearly or mortgage invalidated as against creditors.

11. Every mortgage, or copy thereof, filed in pursuance of this Act, shall cease to be valid, as against the creditors of the persons making the same and against subsequent purchasers and mortgagees in good faith for valuable consideration, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a statement exhibiting the interest of the mortgagee, his executors, administrators or other assigns, in the property claimed by virtue thereof, and shewing the amount still due for principal and interest thereon, and shewing all payments made on account thereof, is again filed in the office of the clerk of the County Court of the county, or union of counties, wherein the goods and chattels are then situate, with an affidavit of the mortgagee, or one of several mortgagees, or of the assignee or one of several assignees, or of the agent of the mortgagee or assignee, or mortgagees or assignees (as the case may be) duly authorized in writing, for that purpose (a copy of which authority shall be filed therewith) that the statement is true, and that the mortgage has not been kept on foot for any fraudulent purpose. 43 V. c. 15, s. 2.

Form of statement and affidavit.

12. The statement and affidavit mentioned in the next preceding section may be in the form given in the schedule B to this Act, or to the like effect. 43 V. c. 15, s. 3.

Mode of filing and entering affidavit and statement.

13. The statement and affidavit shall be deemed one instrument, and be filed and entered in like manner as the instruments in this Act mentioned are, by section 9, required to be filed and entered, and the like fees shall be payable for filing and entering the same as are now payable for filing and entering such instruments. 43 V. c. 15, s. 4.

Yearly statement to be filed.

14. Another statement in accordance with the provisions of section 11 of this Act, duly verified as required by that section, shall be filed in the office of the clerk of the County Court of the county wherein the goods and chattels described in the mortgage are then situate, within thirty days next preceding the expiration of the term of one year from the day of the filing of the statement required by the said section 11, or such mortgage, or copy thereof, shall cease to be valid as against the creditors of the persons making the same, and as against purchasers and mortgagees in good faith for valuable consideration, and so on from year to year, that is to say, another statement as aforesaid, duly verified, shall be filed within thirty days next preceding the expiration of one year from the day of the filing of the former statement, or such mortgage, or copy thereof, shall cease to be valid as aforesaid. 44 V. c. 12, s. 1.

Affidavits, by whom to be made.

15. The affidavit required by section 11 may be made by any next of kin, executor or administrator of any deceased mortgagee, or by any assignee claiming by or through any mortgagee, or any next

of kin, executor or administrator of any such assignee; but if the affidavit is made by any assignee, next of kin, executor or administrator of any such assignee, the assignment, or the several assignments through which the assignee claims shall be filed in the office in which the mortgage is filed, at or before the time of such refileing by the assignee, next of kin, executor or administrator of the assignee. R. S. O. 1877, c. 119, s. 11.

EVIDENCE OF REGISTRATION.

16. A copy of such original instrument or of a copy thereof, so filed as aforesaid, including any statement made in pursuance of this Act, certified by the clerk in whose office the same has been filed, under the seal of the Court shall be received in evidence in all Courts, but only of the fact that the instruments or copy and statement were received and filed according to the endorsement of the clerk thereon, and of no other fact; and in all cases the original endorsement by the clerk made in pursuance of this Act, upon any such instrument or copy, shall be received in evidence only of the fact stated in the endorsement. R. S. O. 1877, c. 119, s. 12.

The Clerk's certificate to be evidence of registration.

DISCHARGE OF MORTGAGES.

17. Where any mortgage of goods and chattels is registered under the provisions of this Act, such mortgage may be discharged, by the filing, in the office in which the same is registered, of a certificate signed by the mortgagee, his executors or administrators, in the form given in the Schedule A hereto, or to the like effect. R. S. O. 1877, c. 119, s. 13.

Certificates for discharging chattel mortgages.

18. The officer with whom the chattel mortgage is filed, upon receiving such certificate, duly proved by the affidavit of a subscribing witness, shall at each place where the number of the mortgage has been entered, with the name of any of the parties thereto, in the book kept under section 9 of this Act, or wherever otherwise in the said book the said mortgage has been entered, write the words, "*Discharged by certificate number* (stating the number of the certificate)," and to the said entry the officer shall affix his name, and he shall also endorse the fact of the discharge upon the instrument discharged, and shall affix his name to the endorsement. R. S. O. 1877, c. 119, s. 14.

Entering certificates of discharge.

19. Where a mortgage has been renewed under section 11 of this Act, the endorsement or entries required by the preceding section to be made need only be made upon the statement and affidavit filed on the last renewal, and at the entries of the statement and affidavit in the said book. 43 V. c. 15, s. 5.

Entries or renewal

20. In case a registered chattel mortgage has been assigned, the assignment may, upon proof by the affidavit of a subscribing witness, be numbered and entered in the alphabetical chattel mortgage book, in the same manner as a chattel mortgage, and the pro-

Entry of assignment of mortgages.

ceedings authorized by the next preceding three sections of this Act may and shall be had, upon a certificate of the assignee, proved in manner aforesaid. R. S. O. 1877, c. 119, s. 16.

MORTGAGES AND SALES OF CHATTELS IN UNORGANIZED DISTRICTS.

Registration
of chattel
mortgages in
Provincial
Judicial Dis-
tricts.

21. Where the personal property mortgaged or sold is within a Provisional Judicial District, the provisions of this Act shall apply to such instrument with the substitution of "the clerk of the District Court" for "the clerk of the County Court;" and with the substitution of "ten days" for "five days" as the time within which the instrument or a copy thereof shall be registered; but this section shall not apply to any portion of Territorial District which forms part of a Provisional Judicial District. R. S. O. 1877, c. 119, s. 17; 43 V. c. 15, s. 7.

In Territorial
Districts.

22. Where the personal property mortgaged or sold is within a Territorial District, the provisions of this Act shall apply to such instrument, with the substitution of "the clerk of the first Division Court of the District" for the "clerk of the County Court," and with the substitution of "ten days" for "five days," as the time within which the instrument or a copy thereof shall be registered. R. S. O. 1877, c. 119, s. 18; 43 V. c. 15, s. 8.

In Temporary
Judicial Dis-
trict of Nipis-
sing.

23. Where the personal property mortgaged or sold is within the Temporary Judicial District of Nipissing the provisions of this Act shall apply to such instrument, with the substitution of "the clerk of the County Court of the County of Renfrew" for "the clerk of the County Court," and with the substitution of "twenty days" for "five days," as the time within which the instrument or a copy thereof shall be registered. R. S. O. 1877, c. 119, s. 19; 43 V. c. 15, s. 9.

FEEES.

Fees for ser-
vices.

24. For services under this Act the clerks aforesaid shall be entitled to receive the following fees:

1. For filing each instrument and affidavit, and for entering the same in a book as aforesaid, fifty cents.

2. For filing assignment of each instrument and for making all proper endorsements in connection therewith, fifty cents. 44 V. c. 8, s. 2; 48 V. c. 27, s. 2; 49 V. c. 16, s. 43.

3. For filing certificate of discharge of each instrument and for making all proper entries and endorsements connected therewith, twenty-five cents;

4. For searching for each paper, ten cents; and

5. For copies of any document with certificate prepared, filed under this Act, ten cents for every hundred words. R. S. O. 1877, c. 119, s. 22, (3-5); 48 V. c. 27, s. 2.

MISCELLANEOUS.

Registration
where time
limited expires

25. Where, under any of the provisions of this Act the time for registering or filing any mortgage, bill of sale, instrument, docu-

ment, affidavit or other paper expires on a Sunday or other day on which the office in which the registering or filing is to be made or done is closed, and by reason thereof the filing or registering cannot be made or done on that day, the registering or filing shall, so far as regards the time of doing or making the same, be held to be duly done or made if done or made on the day on which the office shall next be open. 48 V. c. 27, s. 1.

26. An authority for the purpose of taking or renewing a mortgage or conveyance under the provisions of this Act may be a general one to take and renew all or any mortgages or conveyances to the mortgagee or bargainee. 43 V. c. 15, s. 6.

27. All instruments mentioned in this Act, whether for the sale or mortgage of goods and chattels, shall contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished. R. S. O. 1877, c. 119, s. 23.

28. All affidavits and affirmations required by this Act shall be taken and administered by any Judge, Notary Public, or Commissioner or other person in or out of the Province authorized to take affidavits in and for the High Court or by a Justice of the Peace, and the sum of twenty cents shall be paid for every oath thus administered. R. S. O. 1877, c. 119, s. 24; 41 V. c. 8, s. 12 (2); 48 V. c. 16, s. 1.

29. This Act does not apply to mortgages of vessels registered under the provisions of any Act in that behalf. R. S. O. 1877, c. 119, s. 25.

SCHEDULE A.

(Section 17.)

FORM OF DISCHARGE OF MORTGAGE.

To the Clerk of the Court of the of
I, A. B., of do certify that
has satisfied all money due on, or to grow due on a certain chattel mortgage made by to , which mortgage bears date the day of , A. D., and was registered (or in case the mortgage has been renewed was re-registered) in the office of the Clerk of the Court of the of , on the , A. D., as No. (here mention the day and date of registration of each assignment thereof, and the names of the parties, or mention that such mortgage has not been assigned as the fact may be); and that I am the person entitled by law to receive the money, and that such mortgage is therefore discharged.

Witness my hand, this day of A. D.
One witness stating residence }
and occupation. A. B.

R. S. O. 1877, c. 119, Sched.

SCHEDULE B.

Section (12.)

Statement exhibiting the interest of *C. D.* in the property mentioned in a Chattel Mortgage dated the day of 18 , made between *A. B.*, of of the one part, and *C. D.*, of , of the other part, and filed in the office of the Clerk of the Court of the of , on the day of , 18 , and of the amount due for principal and interest thereon, and of all payments made on account thereof.

The said *C. D.*, is still the mortgagee of the said property, and has not assigned the said mortgage (or the said *E. F.* is the assignee of the said Mortgage by virtue of an assignment thereof from the said *C. D.* to him, dated the day of , 18 ,) (or as the case may be.)

No payments have been made on account of the said Mortgage (or the following payments, and no other, have been made on account of the said Mortgage :

1886, January 1, Cash received.....\$100 00)

The amount still due for principal and interest on the said Mortgage is the sum of \$ computed as follows: [here give the computation.] *C. D.*

County of } I, of the
To wit: } of in the County
of the Mortgagee named in the Chattel Mortgage
mentioned in the foregoing (or annexed) statement (or assignee of
the Mortgagee named in the Chattel Mortgage mentioned
in the foregoing [or annexed] statement,) (as the case may be), make
oath and say :

1. That the foregoing (or annexed) statement is true.
2. That the Chattel Mortgage mentioned in the said statement has not been kept on foot for any fraudulent purpose.

Sworn before me at the)
of in the)
County of this)
day of 18 .

R. S. O. CHAPTER 144.

An Act Respecting Overholding Tenants

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. In the construction of this Act—

Interpretation.

1. "Tenant" shall mean and include an occupant, a sub-tenant, "Tenants." under-tenant, and his and their assigns and legal representatives;

2. "Landlord" shall mean and include the lessor, owner, the "Landlord" person giving or permitting the occupation of the premises in question and the person entitled to the possession thereof, and his and their heirs and assigns and legal representatives. R. S. O. 1877, c. 137, s. 1.

2. In case a tenant, after his lease or right of occupation whether created by writing or by verbal agreement, has expired, or been determined, either by the landlord or the tenant, by a notice to quit or notice pursuant to a proviso in any lease or agreement in that behalf, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, upon demand made in writing, to go out of possession of the land demised to him, or which he has been permitted to occupy, his landlord, or the agent of his landlord, may apply to the County Judge of the county, or union of counties, in which the land lies, and wherever such Judge then is, setting forth, on affidavit, the terms of the demise or right of occupation, if verbal, and annexing a copy of the instrument creating or containing such demise or right of occupation, if in writing (or if a copy cannot be so annexed by reason of the said writing being mislaid, lost or destroyed, or being in the possession of the tenant, or from any other cause, then annexing a statement setting forth the terms of the demise or occupation, and the reason why a copy of the said writing cannot be annexed), and also annexing a copy of the demand made for the delivering up of possession, and stating also the refusal of the tenant to go out of possession, and the reasons given for his refusal if any were given, adding such explanation in regard to the ground of the refusal as the truth of the case may require; and this section shall extend and be construed to apply to tenancies from

Application to be made to the County Judge against overholding tenant upon affidavit.

week to week, from month to month, from year to year, and tenancies at will, as well as to all other terms, tenancies, holdings or occupations. R. S. O. 1877, c. 137, s. 2.

Judge
may appoint
time and place
for enquiry.

3. If, upon such affidavit, it appears to the Judge that the tenant wrongfully holds, without colour of right, and that the landlord is entitled to possession, such Judge shall appoint a time and place at which he will inquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired, or has been determined by a notice to quit or otherwise, and whether the tenant, without any colour of right, holds the possession against the right of the landlord, and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise. R. S. O. 1877, c. 137, s. 3.

Notice thereof
to be served on
the tenant.

4. Notice in writing of the time and place so appointed for holding such inquiry, shall be served by the landlord, upon the tenant or left at his place of abode, at least three days before the day so appointed, if the place so appointed is not more than twenty miles from the tenant's place of abode, and one day in addition for every twenty miles above the first twenty, reckoning any broken number above the first twenty as twenty miles. to which notice shall be annexed a copy of the affidavit on which the appointment was obtained, and of the papers attached thereto. R. S. O. 1877, c. 137, s. 4.

Proceedings in
default of ap-
pearance.

In case of
appearance.

Proceedings to
form part of
the records of
the Court.

Removal on
certiorari.

5. If at the time and place appointed, as aforesaid, the tenant, having been duly notified, as above provided, fails to appear, the Judge, if it appears to him that the tenant holds without colour of right, may order a writ to issue to the sheriff, in the Queen's name, commanding him forthwith to place the landlord in possession of the premises in question; but if the tenant appears at such time and place, the Judge shall, in a summary manner, hear the parties, and examine into the matter, and shall administer an oath or affirmation to the witnesses adduced by either party, and shall examine them; and if after such hearing and examination it appears to the Judge that the case is clearly one coming under the true intent and meaning of section 2 of this Act, and that the tenant holds without colour of right against the right of the landlord, then he shall order the issue of such writ, as aforesaid, otherwise he shall dismiss the case; and the proceedings in any such case, shall form part of the records of the County Court; and the said writ may be in the words or to the effect of Form 1 or Form 2, in the Schedule to this Act, according as the tenant is ordered to pay costs or otherwise. R. S. O. 1877, c. 137, s. 5.

6. Where such writ has been issued, the High Court may on motion, within three months after the issue of the writ, command

the County Judge to send up the proceedings and evidence in the case to the Court, certified under his hand, and may examine into the proceedings, and, if they find cause, may set aside the same, and may if necessary, order a writ to issue to the sheriff, commanding him to restore the tenant to his possession, in order that the question of right, if any appears, may be tried, as in ordinary actions for the recovery of land. R. S. O. 1877, c. 137, s. 6. Writ of restitution.

7. The Judges of the High Court may from time to time, make such rules respecting costs, in cases under this Act, as to them seem just; and the County Judge before whom any such case is brought may, in his discretion, award costs therein, according to any such rule then in force, and if no such rule is in force, reasonable costs, in his discretion, to the party entitled thereto; and in case the party complaining is ordered to pay costs, execution may issue therefor, out of the County Court as in other cases in the County Court, where an order is made for the payment of costs. R. S. O. 1877, c. 137, s. 7. Judges of High Court may make rules as to costs. Execution:

8. The County Judge may cause any person to be summoned as a witness to attend before him in any such case, in like manner as witnesses are summoned in other cases in the County Court, and under like penalties for non-attendance, or refusing to answer in such case. R. S. O. 1877, c. 137, s. 8. Summoning witnesses.

9. Nothing herein contained shall in any way affect the powers of any Judge or Judges of the High Court under sections 23, 24 and 25 of *The Act respecting the Law of Landlord and Tenant*, or shall prejudice or affect any other right or right of action or remedy which landlords may possess in any of the cases herein provided for. R. S. O. c. 137, s. 9. Other remedies of landlords
Rev. Stat. c. 143, ss. 23-25

10. The proceedings under this Act shall be entitled in the County Court of the county or union of counties in which the premises in question are situate, and shall be styled: Proceedings, how entitled.

"In the matter of (*giving the name of the party complaining*), Landlord, against (*giving the name of the party complained against*), Tenant."

R. S. O. 1877, c. 137, s. 10.

11. Service of all papers and proceedings under this Act shall be deemed to have been properly effected if made as required by law, in respect of writs and other proceedings in actions for the recovery of land. R. S. O. 1877, c. 137, s. 11. Service of papers

OVERHOLDING TENANTS.

SCHEDULE.

FORM 1.

(Section 5.)

WRIT OF POSSESSION (WITH COSTS).

ONTARIO, }
To Wit: }

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

[L. S.]

To the Sheriff of the

Greeting :

Whereas Judge of the County Court of _____, by his order dated the _____ day of _____ A. D. 18 _____, made in pursuance of *The Act respecting Overholding Tenants*, on the complaint of _____ against _____, adjudged that _____ was entitled to the possession of _____ with the appurtenances in your Bailiwick, and that a Writ should issue out of Our said Court accordingly, and also ordered and directed that the said _____ should pay the costs of the proceedings had under the said Act, which by Our said Court have been taxed at the sum of _____ :

THEREFORE, WE COMMAND YOU that without delay you cause the said _____ to have possession of the said land and premises, with the appurtenances : And We also command you that of the goods and chattels of the said _____ in your Bailiwick, you cause to be made being the said costs so taxed by Our said Court as aforesaid, and have that money in Our said Court immediately after the execution hereof, to be rendered to the said _____

And in what manner you shall have executed this Writ make appear to Our said Court, immediately after the execution hereof, and have there then this Writ.

Witness,
Court at _____
of _____

Judge of our said _____
day _____, this _____
, A.D. 18 _____

Clerk.

R. S. O. 1877, c. 137, Form 1.

Issued from the office of the Clerk of the
County Court of the County (or United
Counties) of _____
Clerk.

OVERHOLDING TENANTS.

375

FORM 2.

(Section 5.)

WRIT OF POSSESSION (WITHOUT COSTS.)

ONTARIO,
To Wit: }

Victoria, by the Grace of God, of the United Kingdom of
Great Britain and Ireland, Queen, Defender of the Faith.

[L.S.]

To the Sheriff of the

Whereas
Court of the

Greeting:
Judge of the County

by his order dated the
day of A. D. 18 , made in pursuance of *The Act*
respecting Overholding Tenants, on the complaint of
against adjudged that
was entitled to the possession of

And ordered that a writ should issue out of Our said Court accord-
ingly:

THEREFORE WE COMMAND YOU that without delay you cause the said
to have possession of the said land and
premises with the appurtenances, and in what manner you shall
have executed this Writ make appear to Our said Court, immediately
after the execution hereof, and have there then this Writ.

Witness
Court at
of

this
A. D. 18 .

Judge of our said
day

Clerk.

R. S. O. 1877, c. 137, Form 2.

Issued from the Office of the Clerk of the
County Court of the County (or United
Counties of
Clerk.

R. S. O. CHAPTER 214.

An Act to Impose a Tax on Dogs and for the
Protection of Sheep.

HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of the Province of Ontario, enacts as
follows:—

TAX ON DOGS.

Annual tax on
dogs.

1. Subject to the provisions of the next section, there shall be levied annually, in every municipality in Ontario, upon the owner of each dog therein, an annual tax of \$1 for each dog, and \$2 for each bitch. R. S. O. 1877, c. 194, s. 1.

Unless dis-
penssed with
by County
by-law.

2. (1) In case the council of any county or union of counties deems it advisable to dispense with the levy of the said tax, it shall be lawful for such council to declare, by by-law, that the said tax shall not be levied in any of the municipalities within its jurisdiction.

Tax may be
restored by
Township by-
law.

(2) Immediately upon the passing of such county by-law the council shall cause its clerk to transmit a copy of the same to the assessors of every municipality within its jurisdiction; and the county by-law shall have effect within every such municipality, unless the council thereof by by-law declares this Act to be in force therein, whereupon the county by-law shall not apply to or have any effect within such municipality. R. S. O. 1877, c. 194, s. 2.

Duty of assess-
ors herein.

3. The assessors of every municipality within which this Act has not been dispensed with, as provided in the preceding section, shall, at the time of making their annual assessment, enter on the assessment roll, in a column prepared for the purpose, opposite the name of every person assessed, and also opposite the name of every resident inhabitant not otherwise assessed, being the owner or keeper of any dog or dogs, the number by him or her owned or kept. R. S. O. 1877, c. 194, s. 3. See Cap. 191, s. 14 (3), & Sched. B.

Duty of owners
of dogs.

4. The owner or keeper of any dog shall, when required by the assessors, deliver to them, in writing, the number of dogs owned or kept, whether one or more; and for every neglect or refusal to do so, and for every false statement made in respect thereof, shall incur a

Penalty.

penalty of \$5 to be recovered with costs before any Justice of the Peace for the municipality. R. S. O. 1877, c. 194, s. 4.

5. The collector's roll of the municipality shall contain the name of every person entered on the assessment roll as the owner or keeper of any dog with the tax hereby imposed, in a separate column; and the collector shall proceed to collect the same, and at the same time ~~and~~ with the like authority, and make returns to the treasurer of the municipality, in the same manner, and subject to the same liabilities in all respects for paying over the same to the treasurer, as in the case of other taxes levied in the municipality. R. S. O. 1877, c. 194, s. 5.

6. In cases where parties have been assessed for dogs, and the collector has failed to collect the taxes authorized by this Act, he shall report the same under oath to any Justice of the Peace, and such Justice shall, by an order under his hand and seal, to be served by any duly qualified constable, require such dogs to be destroyed by the owners thereof; and if such owners neglect or refuse to obey the said order, they shall be liable to the penalty, to be recovered in the same way and manner as provided in section 15 of this Act; and in case any collector neglects to make the aforesaid report within the time required for paying over the taxes levied in the municipality, he shall be liable to a penalty of \$10 and costs, to be recovered in the same manner as provided in section 15 of this Act. R. S. O. 1877, c. 194, s. 6.

7. The money collected and paid to the clerk or treasurer of any municipality under the preceding sections, shall constitute a fund for satisfying such damages as arise in any year from dogs killing or injuring sheep or lambs in such municipality; and the residue, if any, shall form part of the assets of the municipality for the general purposes thereof; but when it becomes necessary in any year for the purpose of paying charges on the same, the fund shall be supplemented to the extent of the amount which has been applied to the general purposes of the municipality. R. S. O. 1877, c. 194, s. 7.

8. (1) In case the council of any county or union of counties deems it advisable that the tax by this Act established should be maintained, but that the application of the proceeds thereof by this Act provided should be dispensed with, it shall be lawful for such council by by-law to declare that such application shall be dispensed with; and thereafter during the continuance of such by-law, the sections of this Act numbered 6, 7, and 15 to 21 inclusive shall have no force or effect in any of the municipalities within the jurisdiction of such council; and the moneys collected and paid to the clerk or treasurer of any such municipality, under the remaining sections of this Act, shall be the property of such municipality, and shall be subject to its disposition in like manner as other local taxes. R. S. O. 1877, c. 194, s. 8.

Township may pass by-law to apply proceeds of taxes in payment for sheep.

- (2) Immediately upon the passing of such county by-law the council shall cause its clerk to transmit a copy of the same to the clerk of every municipality within its jurisdiction, and the county by-law shall have effect within every such municipality, unless the council thereof by by-law declares this Act to be in force therein, whereupon the said county by-law shall not apply to or have any effect within such municipality. 47 V. c. 40, s. 1.

PROTECTION OF SHEEP.

Dogs seen worrying sheep may be killed.

- 9.** Any person may kill any dog which he sees pursuing, worrying or wounding any sheep or lamb. R. S. O. 1877, c. 194, s. 10.

Plea to action for killing a dog.

- 10.** The defendant in any action of damages for killing a dog under the circumstances in the preceding section mentioned, may plead not guilty by statute and give this Act and the special matter in evidence. R. S. O. 1877, c. 194, s. 11.

Persons owning dogs addicted to worrying may be summoned before a Justice of the Peace.

- 11.** On complaint made in writing on oath before a Justice of the Peace for any city, town or county, or union of counties, that any person residing in such city, town or county, or union of counties, owns or has in his possession a dog which has within six months previous worried or injured or destroyed any sheep, the Justice of the Peace may issue his summons, directed to such person, stating shortly the matter of the complaint, and requiring such person to appear before him, at a certain time and place therein stated, to answer to such complaint, and to be further dealt with according to law. R. S. O. 1877, c. 194, s. 12.

Proceedings how regulated. Rev. Stat. c. 74.

- 12.** The proceedings on the complaint and summons shall be regulated by *The Act respecting Summary Convictions before Justices of the Peace and Appeals to General Sessions*, which shall apply to cases under this Act. R. S. O. 1877, c. 194, s. 13.

On conviction of the fact, dog to be ordered to be destroyed and owner fined.

- 13.** In case any person is convicted, on the oath of a credible witness, of owning or having in his possession a dog which has worried and injured or destroyed any sheep, the Justice of the Peace may make an order for the killing of such dog (describing the same according to the tenor of the description given in the complaint and in the evidence) within three days, and in default thereof may in his discretion impose a fine upon such person, not exceeding \$20 with costs; and all penalties imposed under this section shall be applied to the use of the municipality in which the defendant resides. R. S. O. 1877, c. 194, s. 14.

Conviction no bar to action for damages.

- 14.** No conviction under this Act shall be a bar to any action by the owner or possessor, as aforesaid, of any sheep, for the recovery of damages for the injury done to such sheep, in respect of which such conviction is had. R. S. O. 1877, c. 194, s. 15.

15. (1) The owner of any sheep or lamb killed or injured by any dog shall be entitled to recover the damage occasioned thereby from the owner or keeper of such dog, by an action for damages or by summary proceedings before a Justice of the Peace, on information or complaint before such Justice, who is hereby authorized to hear and determine such complaint, and proceed thereon in the manner provided by *The Act respecting Summary Convictions before Justices of the Peace and Appeals to General Sessions*, in respect to proceedings therein mentioned; and such aggrieved party shall be entitled so to recover on such action or proceedings, whether the owner or keeper of such dog knew or did not know that it was vicious or accustomed to worry sheep. R. S. O. 1877, c. 194, s. 16.

(2) If it shall appear before the Court or Judge at the trial of any such action for damages, or before such Justice at the hearing of the said information or complaint before him, that the damage or some part of the damage sustained by such aggrieved party was the joint act of some other dog or dogs, and of the dog or dogs owned or kept by the person charged in such information or complaint, the Court, Judge or Justice shall have power to decide and apportion the damages sustained by the complainant, among and against the respective owners or keepers of the said dogs, as far as such owners or keepers are known, in such shares and proportions as such Court, Judge or Justice shall think fit, and to award the same by the judgment of the said Court or Judge, or in the conviction of such Justice, on behalf of such aggrieved person.

(3) When in the opinion of the Court, Judge or Justice, the damages were occasioned by dogs the owner or owners of which are known, and dogs the owner or owners of which are unknown, or the owner or owners of which have not been summoned to appear before the Court, Judge or Justice, the Court, Judge or Justice may decide and adjudge as to the proportion of the damages which, having regard to the evidence adduced as to the strength, ferocity and character of the various dogs shewn to have been engaged in committing such damage, was probably done by the dogs the owner or owners of which have been summoned to appear before the Court, Judge or Justice, and shall determine in respect thereof and apportion the damage which the Court, Judge or Justice decides to have been probably done by the dogs whose owners have been summoned, amongst the various owners who have been summoned as aforesaid.

(4) The same proceedings shall be thereupon had against any person found by the Judge or Justice to be the owner or keeper of the dog or dogs which by such Court, Judge or Justice shall have been found to have contributed to the damage sustained by the person aggrieved, as if the information or complaint had been laid in the first instance against such person.

(5) The Court, Judge or Justice shall not decide and apportion the damage against any person other than the person in the information or complaint first charged, nor award the same in the judgment or conviction without such other person having been summoned to appear before the Court, Judge or Justice, and having had an opportunity of calling witnesses.

(6) Appeals against any conviction, apportionment or order made under this section, shall be made to the Division Court holden in the division in which the cause of action arose, or in which the party complained against, or one of them, resided at the time of making the complaint; and the proceedings shall be the same as nearly as may be, as on appeals under *The Act respecting Master and Servant*. 48 V. c. 46, s. 1.

Rev. Stat.
c. 139.

Dogs known
to worry sheep
to be killed
by owner.

Penalty.

Proviso.

Proviso

Provision for
cases where
there is a con-
viction, but
distress insuf-
ficient.

Provision for
cases in which
owner of dog
not known.

16. The owner or keeper of any dog or dogs, to whom notice is given of any injury done by his dog or dogs to any sheep or lamb, or of his dog or dogs having chased or worried any sheep or lamb, shall, within forty-eight hours after such notice, cause such dog or dogs to be killed; and for every neglect so to do he shall forfeit a sum of \$2.50 for each such dog, and a further sum of \$1.25 for each such dog for every forty-eight hours thereafter, until the same is killed, if it is proved to the satisfaction of the Justice of the Peace before whom proceedings are taken for the recovery of such penalties, that such dog or dogs has or have worried or otherwise injured such sheep or lamb; but no such penalties shall be enforced in case it appears to the satisfaction of the Justice of the Peace that it was not in the power of the owner or keeper to kill such dog or dogs. R. S. O. 1877, c. 194, s. 17.

17. In case the owner of any sheep or lamb so killed or injured proceeds against the owner or keeper of the dog that committed the injury, before a Justice of the Peace, as provided by this Act, and is unable on the conviction of the offender, to levy the amount ordered to be paid, for want of sufficient distress to levy the same, then the council of the municipality in which the offender resided at the time of the injury shall order their treasurer to pay to the aggrieved party the amount ordered to be paid by the Justice under the conviction, saving and excepting the costs of the proceedings before the Justice and before the council. R. S. O. 1877, c. 194, s. 18.

18. The owner of any sheep or lamb killed or injured by any dog, the owner or keeper of which is not known, may within three months apply to the council of the municipality in which such sheep or lamb was so killed or injured, for compensation for the injury; and if the council (any member of which shall be competent to administer an oath or oaths in examining parties in the premises) is satisfied that the aggrieved party has made diligent search and inquiry to ascertain the owner or keeper of such dog, and that such

owner or keeper cannot be found, they shall award to the aggrieved party for compensation a sum not exceeding two-thirds of the amount of the damage sustained by him; and the treasurer of the municipality shall pay over to him the amount so awarded. R. S. O. 1877, c. 194, s. 19.

19. After the owner of such sheep or lamb has received from the municipality any money under either of the preceding sections, his claim shall thenceforth belong to the municipality; and they may enforce the same against the offending party for their own benefit, by any means or form of proceeding that the aggrieved party was entitled to take for that purpose, but in case the municipality recovers from the offender more than they had paid to the aggrieved party, besides their costs, they shall pay over the excess to the aggrieved party for his own use. R. S. O. 1877, c. 194, s. 20.

After compensation paid by municipality, claims to belong to them.

Proviso.

20. The owner of any sheep or lamb killed or injured while running at large upon any highway or unenclosed land, shall have no claim under this Act to obtain compensation from any municipality. R. S. O. 1877, c. 194, s. 21.

Cases where owner of sheep, etc., has no compensation.

21. If the council of any county or union of counties, by by-law, decides to dispense with the levy of the aforesaid tax in the municipalities within its jurisdiction, the owner of any sheep or lamb may, notwithstanding, sue the owner or keeper of any dog or dogs for the damage or injury done by the said dog or dogs to the said sheep or lamb; and the same shall be recovered in the manner provided by section 15 of this Act. R. S. O. 1877, c. 194, s. 22.

Liability of dog owner to sheep owner where tax not imposed.

22. Every Justice of the Peace shall be entitled to charge such fees in cases of prosecutions or orders under this Act as it is lawful for him to charge in other cases within his jurisdiction, and he shall make the returns usual in cases of conviction, and also a return in each case to the clerk of the municipality, whose duty it shall be to enter the same in a book to be kept for that purpose. R. S. O. 1877, c. 194, s. 23.

Fees and returns by Justices.

R. S. O. CHAPTER 215.

An Act Respecting Pounds.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

- Act may be superseded by by-laws under Rev. Stat. c 184, s. 490.
1. Until varied or other provisions are made by by-laws passed under the authority of section 490 of *The Municipal Act*, this Act shall be in force in every township, city, town, and incorporated village in Ontario. R. S. O. 1877, c. 195, s. 1.
- Liability for damage done.
2. The owner or occupant of any land shall be responsible for any damage or damages caused by any animal or animals under his charge and keeping, as though such animal or animals were his own property, and the owner of any animal not permitted to run at large by the by-laws of the municipality, shall be liable for any damage done by such animal, although the fence enclosing the premises was not of the height required by such by-laws. R. S. O. 1877, c. 195, s. 2.
- What animals to be impounded.
3. If not previously replevied, the pound-keeper shall impound any horse, bull, ox, cow, sheep, goat, pig, or other cattle, geese or other poultry, distrained for unlawfully running at large, or for trespassing and doing damage, delivered to him for that purpose by any person resident within his division who has distrained the same; or if the owner of geese or other poultry refuses or neglects to prevent the same from trespassing on his neighbour's premises after a notice in writing has been served upon him of their trespass, then the owner of such poultry may be brought before any Justice of the Peace and fined such sum as the Justice directs. R. S. O. 1877, c. 195, s. 3.
- Poultry.
4. When the common pound of the municipality or place wherein a distress has been made is not secure, the pound-keeper may confine the animal in any enclosed place within the limits of the pound-keeper's division within which the distress was made. R. S. O. 1877, c. 195, s. 4.
- When the common pound is not safe.
5. The owner of any animal impounded shall at any time be entitled to his animal, on demand made therefor, without payment of any poundage fees, on giving satisfactory security to the pound-keeper for all costs, damages, and poundage fees that may be

established against him, but the person distraining and impounding the animal shall, at the time of the impounding, deposit poundage fees, if such are demanded, and within twenty-four hours thereafter deliver to the pound-keeper duplicate statements in writing of his demands against the owner for damages (if any), not exceeding \$20, done by such animal, exclusive of such poundage fees, and shall also give his written agreement (with a surety if required by the pound-keeper) in the form following, or in words to the same effect :

"I (or we, as the case may be) do hereby agree that I (or we) will pay to the owner of the (describing the animal) by me (A. B. this day) impounded, all costs to which the said owner may be put in case the distress by me the said A. B. proves to be illegal, or in case the claim for damages now put in by me the said A. B. fails to be established."

Form of agreement with pound-keeper.

R. S. O. 1877, c. 195, s. 5.

6. In case the animal distrained is a horse, bull, ox, cow, sheep, goat, pig or other cattle, and if the same is distrained by a resident of the municipality for straying within his premises, such person, instead of delivering the animal to a pound-keeper, may retain the animal in his own possession, provided he makes no claim for damages done by the animal, and duly gives the notices hereinafter in that case required of him. R. S. O. 1877, c. 195, s. 6.

When animal may be retained by distrainer.

7. If the owner is known to him, he shall forthwith give to the owner notice in writing of having taken up the animal. R. S. O. 1877, c. 195, s. 7.

Notice owner if known.

8. If the owner is unknown to the person taking up and retaining possession of the animal, such person shall, within forty-eight hours, deliver to the clerk of the municipality a notice in writing of having taken up the animal, and containing a description of the colour, age and natural and artificial marks of the animal, as near as may be. R. S. O. 1877, c. 195, s. 8.

If unknown, notice to clerk of municipality.

9. The clerk, on receiving such notice, shall forthwith enter a copy thereof in a book to be kept by him for that purpose, and shall post the notice he receives, or copy thereof, in some conspicuous place on or near the door of his office, and continue the same so posted for at least one week, unless the animal is sooner claimed by the owner. R. S. O. 1877, c. 195, s. 9.

Duty of clerk thereon.

10. If the animal or any number of animals taken up at the same time is or are of the value of \$10 or more, the distrainer shall cause a copy of the notice to be published in a newspaper in the county, if one is published therein, and if not, then in a newspaper published in an adjoining county, and to be continued therein once a week for three successive weeks. R. S. O. 1877, c. 195, s. 10.

If the animals are worth \$10 or over.

11. In case an animal is impounded, notices for the sale thereof shall be given by the pound-keeper or person who impounded the animal within forty-eight hours afterwards, but no pig or poultry

Notice of sale

When sale
may be made.

shall be sold till after four clear days, nor any horse or other cattle till after eight clear days from the time of impounding the same. R. S. O. 1877, c. 195, s. 11.

If animal is
not impound-
ed, but
retained.

12. In case the animal is not impounded, but is retained in the possession of the party distraining the same, if the animal is a pig, goat or sheep, the notices for the sale thereof shall not be given for one month, and if the animal is a horse or other cattle, the notices shall not be given for two months after the animal is taken up. R. S. O. 1877, c. 195, s. 12.

Notice of sale
unless re-
deemed.

13. The notices of sale may be written or printed, and shall be affixed and continued for three clear successive days, in three public places in the municipality, and shall specify the time and place at which the animal will be publicly sold, if not sooner replevied or redeemed by the owner or some one on his behalf, paying the penalty imposed by law (if any), the amount of the injury (if any) claimed or decided to have been committed by the animal to the property of the person who distrained it, together with the lawful fees and charges of the pound-keeper, and also of the fence-viewers (if any); and the expenses of the animal's keeping. R. S. O. 1877, c. 195, s. 13.

Keeper to feed
impounded
cattle.

14. Every pound-keeper, and every person who impounds or confines, or causes to be impounded or confined, any animal in any common pound or in any open or close pound, or in any enclosed place, shall daily furnish the animal with good and sufficient food, water and shelter, during the whole time that such animal continues impounded or confined. R. S. O. 1877, c. 195, s. 14.

And may re-
cover the
value.

15. Every such person who furnishes the animal with food, water and shelter, may recover the value thereof from the owner of the animal, and also a reasonable allowance for his time, trouble and attendance in the premises. R. S. O. 1877, c. 195, s. 15.

In what man-
ner such value
may be re-
covered.

16. The value or allowance as aforesaid may be recovered with costs, by summary proceeding before any Justice of the Peace within whose jurisdiction the animal was impounded, in like manner as fines, penalties or forfeitures for the breach of any by-law of the municipality may by law be recovered and enforced by a single Justice of the Peace; and the Justice shall ascertain and determine the amount of such value and allowance when not otherwise fixed by law, adhering, so far as applicable, to the tariff of pound-keepers' fees and charges established by the by-laws of the municipality. R. S. O. 1877, c. 195, s. 16.

Other mode of
enforcing.

17. The pound-keeper, or person so entitled to proceed, may, instead of such summary proceeding, enforce the remuneration to which he is entitled in a manner hereinafter mentioned. R. S. O. 1877, c. 195, s. 17.

18. In case it is proved by affidavit before one of the Justices aforesaid, to his satisfaction, that all the proper notices had been duly affixed and published in the manner and for the respective times above prescribed, then if the owner or some one for him does not within the time specified in the notices, or before the sale of the animal, replevy or redeem the same in manner aforesaid, the pound-keeper who impounded the animal, or if the person who took up the animal did not deliver such animal to any pound-keeper, but retained the same in his own possession, then any pound-keeper of the municipality may publicly sell the animal to the highest bidder, at the time and place mentioned in the aforesaid notices, and after deducting the penalty and the damages (if any) and fees and charges, shall apply the product in discharge of the value of the food and nourishment, loss of time, trouble and attendance so supplied as aforesaid, and of the expenses of driving or conveying and impounding or confining the animal, and of the sale and attending the same, or incidental thereto, and of the damage when legally claimable (not exceeding \$20) to be ascertained as aforesaid, done by the animal to the property of the person at whose suit the same was distrained, and shall return the surplus (if any) to the original owner of the animal, or if not claimed by him within three months after the sale, the pound-keeper shall pay such surplus to the treasurer of and for the use of the municipality. R. S. O. 1877, c. 195, s. 18.

19. If the owner, within forty-eight hours after the delivery of such statements, as provided in section 5, disputes the amount of the damages so claimed, the amount shall be decided by the majority of three fence-viewers of the municipality, one to be named by the owner of the animal, one by the person distraining or claiming damages, and the third by the pound-keeper. R. S. O. 1877, c. 195, s. 19.

20. Such fence-viewers or any two of them shall, within twenty-four hours after notice of their appointment as aforesaid, view the fence and the ground upon which the animal was found doing damage, and determine whether or not the fence was a lawful, one according to the statutes or by-laws in that behalf at the time of the trespass; and if it was a lawful fence, then they shall appraise the damages committed, and, within twenty-four hours after having made the view, shall deliver to the pound-keeper a written statement signed by at least two of them of their appraisal and of their lawful fees and charges. R. S. O. 1877, c. 195, s. 20.

21. If the fence-viewers decide that the fence was not a lawful one they shall certify the same in writing under their hands, together with a statement of their lawful fees to the pound-keeper, who shall, upon payment of all lawful fees and charges, deliver such animal to the owner if claimed before the sale thereof, but if not

Sale, how effected, etc., and purchase money, how applied.

Disputes regarding demand for damages how determined.

Fence-viewers to view and appraise damage.

Proceedings where fence-viewers decide against the legality of a fence.

claimed, or if such fees and charges are not paid, the pound-keeper, after due notice, as required by this Act, shall sell the animal in the manner before mentioned at the time and place appointed in the notices. R. S. O. 1877, c. 195, s. 21.

Liability of pound-keeper refusing to feed animal impounded.

22. In case a pound-keeper or person who impounds or confines, or causes to be impounded or confined, any animal as aforesaid, refuses or neglects to find, provide and supply the animal with good and sufficient food, water and shelter as aforesaid, he shall, for every day during which he so refuses or neglects, forfeit a sum not less than \$1 nor more than \$4. R. S. O. 1877, c. 195, s. 22.

Penalty for neglect of duty by fence-viewers.

23. Any fence-viewer neglecting his duty as arbitrator as aforesaid, shall incur a penalty of \$2, to be recovered for the use of the municipality, by summary proceedings before a Justice of the Peace upon the complaint of the party aggrieved or the treasurer of the municipality. R. S. O. 1877, c. 195, s. 23.

Recovery and enforcement of penalties.

24. Every fine and penalty imposed by this Act may be recovered and enforced, with costs, by summary conviction, before any Justice of the Peace for the county or of the municipality in which the offence was committed; and in default of payment the offender may be committed to the common gaol, house of correction, or lock-up house of the county or municipality, there to be imprisoned for any time in the discretion of the convicting and committing Justice, not exceeding fourteen days, unless the fine and penalty, and costs, including the costs of the committal, are sooner paid. R. S. O. 1877, c. 195, s. 24.

Imprisonment in default of payment.

Application of penalties.

25. When not otherwise provided, every pecuniary penalty recovered before any Justice of the Peace under this Act shall be paid and distributed in the following manner: one moiety to the city, town, village or township in which the offence was committed, and the other moiety thereof, with full costs, to the person who informed and prosecuted for the same, or to such other person as to the Justice seems proper. R. S. O. 1877, c. 195, s. 25.

51 VICTORIA, CHAPTER 10

An Act to Amend the Division Courts Act.

[Assented to 23rd March, 1888.]

HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of the Province of Ontario, enacts as
follows:

1. Section 100 of *The Division Courts Act* is hereby amended Rev Stat c. 51, s. 100.
by inserting after the words "or has absconded," in the sixth line amended
thereof, the words "either before or after the issue of the sum-
mons."

2. Section 148 of the said *Division Courts Act* is hereby Rev. Stat c. 51, s. 148,
amended by adding after the word "cause," in the first line of sub-
section 1 the words following: "or any of the parties to garnishee
proceedings under this Act," and by adding to said sub-section 1 the
words: "and shall include any party to garnishee proceedings and
any party added by order of the Judge."

3. Section 240 of the said Act is hereby amended by striking Rev. Stat. c. 51, s. 240,
out of sub-section 4 thereof the following: "(b) Wilfully contracted
the debt or liability without having had at the time a reasonable
expectation of being able to pay or discharge the same; or,"

[N. B.—The reader will please make the necessary interlineation
with a pen, at page 139 *ante*, required by Section 1 of this Act; at
page 176 *ante*, required by Section 2, and by erasing the whole of
sub-section (b) of sub-section 4 at page 251 *ante* in accordance with
Section 3.]

51 VICTORIA, CHAPTER 11.

An Act to Amend the Law as to Executions.

[Assented to 23rd March, 1888.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Rev. Stat. c.
65, s. 4,
amended.

1. Section 4 of *The Creditors' Relief Act* shall apply to any moneys received by a sheriff as the proceeds of a sale by him under an interpleader order, but in case the money is ordered to be paid into Court by the sheriff pending the trial of an interpleader issue, the entry to be made by the sheriff shall not be made until the said money is again paid out of Court to the sheriff for distribution.

Ratable distribution of property.

2. In distributing money under the said section creditors who have executions against goods only shall be entitled to share ratably with all others any moneys realized under executions against lands; and creditors having executions against lands only shall be entitled to share ratably with all others any moneys realized under executions against goods.

Rev. Stat. c.
65, s. 20,
amended.

3. Section 20 of the said Act is amended by striking out of the fourth line the words "served on the debtor," and by substituting therefor the words "filed with the Clerk of the County Court."

Enforcing division court claims.

4. Where any Division Court judgment or execution has been or shall hereafter be filed with any sheriff under *The Creditors' Relief Act*, or a certificate for any claim within the jurisdiction of the Division Court, and the same is not paid in full, and the sheriff is unable to make the money thereon, the creditor may obtain a return thereof from the sheriff according to the facts, and file the same with the clerk of the Division Court in which the judgment was recovered, or in the place where the cause of action arose, or the debtor, or one of the debtors, if more than one, resided, and the Clerk of the Division Court shall enter the same in his proper books, and it shall thereupon become a judgment of the said Court for the unpaid balance due thereon as appearing by the sheriff's return, and the claim may be enforced in the same manner as any other judgment of the Division Court.

5. Section 53 of *The Land Titles Act* is amended by inserting Rev. Stat. c. 116, s. 53 (1), in the third line of sub-section 1, immediately after the word amended. "shall," the following words: "upon the written request of the party by whom such execution or other writ was sued out or renewed or of his solicitor, but not otherwise."

6. Section 7 of *The Execution Act* is amended by adding after Rev. Stat. c. the word "issues," in the eighth line, the words "if a Court of 64, s. 7, amended. Record; or, where the execution issues out of a Division Court, by the Clerk of the Court."

[N. B.—The reader will please make the corrections required by this Act at the proper pages in R. S. O.]

51 VICTORIA. CHAPTER 19.

An Act respecting Conditional Sales of Chattels.

[Assented to 23rd March, 1888. Comes into force 1st January, 1889.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Conditional sales of manufactured goods when to be valid.

1. From and after the coming into force of this Act, receipt notes, hire receipts and orders for chattels, given by bailees of chattels, where the condition of the bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money or some stipulated part thereof, shall only be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration in the case of manufactured goods or chattels, which at the time possession is given to the bailee, have the name and address of the manufacturer, bailor or vendor of same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto, and no such bailment shall be valid as against such subsequent purchaser or mortgagee as aforesaid, unless it is evidenced in writing, signed by the bailee or his agent.

Statement of amount due to be given on request.

2. Every manufacturer, bailor or vendor shall, on application by any proposed purchaser or other interested person, within five days furnish full information respecting the amount or balance due or unpaid on any such manufactured goods or chattels, and the terms of payment of such amount or balance, and in case of refusal or neglect to furnish the information asked for, such manufacturer, bailor or vendor shall be liable to a fine not exceeding \$50 on conviction before a stipendiary or police magistrate or two justices of the peace. Any person convicted under this Act shall have the right to appeal to the County Judge against such conviction.

Address to be given by person demanding statement

3. The person so enquiring (if by letter) shall give a name and post office address to which a reply may be sent, and it shall be sufficient if the information aforesaid be given by registered letter deposited in the post office within the said five days, addressed to the person enquiring at his proper post office address, or where a name and address is given as aforesaid, addressed to such person by the name and at the post office so given.

1. If any manufacturer, bailor or vendor of such chattel or chattels or his successor in interest, where there has been a conditional sale or promise of sale, take possession thereof for breach of condition, he shall retain the same for twenty days, and the bailee or his successor in interest may redeem the same within such period on payment of the full amount then in arrear, together with interest and the actual costs and expenses of taking possession which have been incurred.

5. When the goods or chattels have been sold or bailed originally for a greater sum than \$30, the same, when taken possession of, as in the preceding section mentioned, shall not be sold without five days' notice of the intended sale being first given to the bailee or his successor in interest. The notice may be personally served or may, in the absence of such bailee or his successor in interest, be left at his residence or last known place of abode in Ontario, or may be sent by registered letter, deposited in the post office at least seven days before the time when the said five days will elapse, addressed to the bailee or his successor in interest, at his last known post office address in Canada. The said five days or seven days may be part of the twenty days in section 4 mentioned.

6. Section 1 of this Act shall not apply to household furniture, but pianos, organs, or other musical instruments are not included in the term "household furniture" when it appears in this section; nor shall section 1 apply to chattels where the manufacturer, bailor or vendor, within ten days from the execution of any receipt note, hire receipt, order or other instrument evidencing the bailment or conditional sale given to secure the purchase money, or part thereof, shall file with the clerk of the County Court of the county in which the bailee or conditional purchaser resided at the time of the bailment or conditional purchase, a copy of the said receipt note, hire receipt, order or other instrument evidencing the bailment or conditional sale.

7. The clerk of the Court, on receipt of such copy, shall duly file the same and cause it to be properly entered in an index book to be kept for that purpose, and shall be entitled to charge ten cents for every such filing and five cents for every search in respect thereof. A clerical error which does not mislead, or an error in an immaterial or non-essential part of the said copy so filed, shall not invalidate the said filing or destroy the effect thereof.

8. The manufacturer, bailor or vendor shall leave a copy of the receipt note, hire receipt, order or other instrument by which a lien on the chattel is retained, or which provides for a conditional sale, with the bailee or conditional vendee at the time of the execution of the instrument, or within twenty days thereafter.

9. This Act shall not come into force until the first day of January, 1889.

Power to redeem chattel.

Notice of sale

Section 1 not to apply to household furniture.

Section 1 not to apply when copy of receipt filed with clerk of county court.

Clerk to file copy of receipt.

Copy of receipt to be left with vendee.

Commencement of Act.

NEW RULES, TARIFF OF FEES, FORMS AND ORDERS

WHICH CAME INTO FORCE ON THE FIRST DAY OF JANUARY, 1885.

We, the undersigned, "The Board of County Judges," acting under and in pursuance of the powers vested in us by the Division Courts Act, have framed the following additional Rules and Orders to be in force from and after the first day of January, A. D. 1885, until otherwise ordered ;

And we do certify the same under the provisions of the 239th (now 299th) section of the said the Division Courts Act accordingly.

RULES.

No. 181.—From and after the first day of January, 1885, Rule No. 171, of the additional Rules and Orders of the 28th day of November, 1879, and Form 129, and Schedule of Clerks' Fees (Form 130), and Schedule of Bailiffs' Fees (Form 131), shall be rescinded; and the fees set forth in the Tariff hereto annexed, marked Schedule of Clerks' Fees (Form 133), and Schedule of Bailiffs' Fees (Form 134), shall be the fees to be received by the several Clerks and Bailiffs of Division Courts in Ontario for and in relation to the duties and services to be performed by them as officers of the said Courts, and shall be in lieu of all other fees heretofore receivable.

No. 182.—Rule No. 179 and Form 129 are hereby rescinded from and after the said first day of January, 1885, and Form No. 132 is substituted for the said Form No. 129.

No. 183.—Rule No. 178 is hereby amended by substituting for the words and figures "Form 129," the words and figures "Form 132."

No. 184.—All summary applications to a Judge in Chambers other than applications for new trials under Rule No. 142 may be made on notice or by summons.

FORMS OF BILLS OF COSTS.

FORM 132

BILL OF COSTS upon a claim, for say \$20 up to and including judgment entered by the clerk upon special summons, no notice of defence being given :

Clerk's Fees.

Receiving claim, numbering and entering in Procedure Book.....	\$0 15
Issuing Summons with necessary notices and warnings thereon.....	0 40
Copy of summons, including all notices and warnings thereon.....	0 20
Receiving and entering Bailiff's return to summons.....	0 15
Affidavit of service and administering oath to the deponent.....	0 25
Notice to Plaintiff, when defendant has failed to give notice of defence, 15c.; postage and registration 5c.....	0 20
Entering final judgment by the Clerk.....	0 50
Total Clerk's fees.....	<u>\$1 85</u>

Bailiff's Fees.

Service of summons.....	\$0 30
Return of service and attending Clerk's office to make necessary affidavit.....	0 15
Total Bailiff's fees.....	<u>0 45</u>

Total costs.....	<u>\$2 30</u>
------------------	---------------

Taxed this day of 18 .

Clerk.

BILL OF COSTS upon claim for say, \$60.00, defended, cause tried, and judgment entered for plaintiff with costs :

Clerk's Fees.

Receiving claim, &c.....	\$0 15
Issuing summons, &c.....	0 50
Copy of summons, &c.....	0 20
Receiving and entering Bailiff's return, &c.....	0 15
Affidavit of service, &c.....	0 25
Entering and noting defence, &c., in Procedure Book.....	0 25
Subpoena to witness.....	0 1

Three copies.....	\$0 15
Notice of defence, &c., to plaintiff, and mailing same, 15c.; postage and registration, 5c.....	0 20
Recording and entering judgment rendered at the hearing.....	0 50
Total Clerk's Fees.....	\$2 50

Bailiff's Fees.

Service of summons, &c.....	\$0 40
Attending to return, &c.....	0 15
Service of subpoena (3 witnesses).....	0 45
Calling parties and their witnesses.....	0 15
Total Bailiff's fees	1 15

Total costs..... \$3 65

Taxed this day of 18 .

Clerk.

N. B.—Mileage and fees to witnesses, if any, to be added.

FORM 133.

SCHEDULE OF CLERKS' FEES

1. Receiving claim, numbering and entering in Procedure Book.... \$0 15
[This item to apply to entering in the procedure book a transcript of judgment from another court, but not an entry made for the issue of a judgment summons.]
2. Issuing summons with necessary notices and warnings thereon,
or judgment summons (as provided in the forms), in all,
Where claim does not exceed \$20..... 0 40
“ “ exceeds \$20 and does not exceed \$60..... 0 50
“ “ exceeds \$60 and does not exceed \$100..... 0 60
“ “ exceeds \$100..... 1 00

[N. B.—In replevin and interpleader suits the value of goods to regulate the fee.]

3. Copy of summons, including all notices and warnings thereon... 0 20
4. Copy of claim (including particulars), when not furnished by plaintiff, (to be paid by the plaintiff)..... 0 20

\$0 15	5. Copy of set-off (including particulars), when not furnished by the defendant (to be paid by the defendant).....	\$0 20
0 20	6. Receiving and entering Bailiff's return to any summons, writ or warrant issued under the seal of the Court (except summons to witness and return to summons, or papers from another Division)	0 15
0 50	7. Entering and noting every defence or notice of admission in Procedure Book.....	0 25
\$2 50	[To be paid in the first instance by the defendant or other person entering it—but it may be afterwards taxed against the plaintiff should costs be given against him.]	
1 15	8. Taking confession of judgment	0 10
\$3 65	[This does not include affidavit and oath, chargeable under item 9.]	
	9. Every necessary affidavit, if actually prepared by the Clerk, and administering oath to the deponent.....	0 25
	10. Copies of papers for which no fee is already provided—necessarily required for service or transmission to the Judge—each.....	0 10
\$0 15	11. Every notice of defence or admission entered, or other notice required to be given by the Clerk to any party to a cause or proceeding, or to the Judge in respect to the same, and mailing.....	0 15
	12. Entering final judgment by Clerk, on special summons, where claim not disputed.....	0 50
	13. Entering every judgment rendered at the hearing, or final order made by the Judge.....	0 50
0 40	[This one fee of 50 cts. will include the service of recording at the trial and afterwards entering in the procedure book the judgment, decree and order in its entirety, rendered or made at the trial. In a garnishee proceeding before judgment, the fee of 50 cts. will be allowed for the judgment in respect to the primary debtor, and a like fee of 50 cts. for the adjudication whenever made in respect to the garnishee.]	
0 50		
0 60		
1 00		
	14. Subpœna to witness.....	0 15
0 20	[The Subpœna may include any number of names therein, and only one original subpœna shall be taxed, except the Judge otherwise orders.	
0 20		

15. For every copy of Subpoena required for service..... \$0 05
16. Summons for each juryman, when called by the parties..... 0 10
 [Only 25 cts. in all is to be allowed for returning a Judge's jury.]
17. Every order of reference or order for adjournment made at hearing and every order requiring the signature of the Judge, and entering the same..... 0 25
 [Any warning necessary with order, *e. g.*, the warning in form 42, forms part of the order.]
18. Transcript of judgment (under sections 161 or 165) [now sections 217 or 223] 0 25
19. Every writ of execution, warrant of attachment, or warrant for arrest of delinquent and delivering same to Bailiff..... 50
20. Renewal of every writ of execution when ordered by the judgment creditor..... 0 15
21. Every bond when necessary and prepared by the Clerk (including affidavit of justification) 0 50
22. For necessary entries in the debt attachment book in each case (in all)..... 0 20
23. Transmitting transcript of judgment; or transmitting papers for service to another division, or to Judge on application to him, including necessary entries, but not postage..... 0 25
24. Receiving papers from another division for service, entering the same, handing to the Bailiff, receiving and entering his return, and transmitting the same (if return made promptly, not otherwise)..... 0 30
 [This fee does not include a charge for receiving transcript of judgment, for which a fee of 15 cents is taxable under item 1.]
25. Search by person not party to the suit or proceeding, to be paid by the applicant, 10c.; search by party to the suit or proceeding where service is over one year old..... 0 10
 [No fee is chargeable for search to a party to the suit or proceeding, if the same is not over one year old.]
26. Taxing costs in defended suits..... 0 25

FORM 134.

SCHEDULE OF BAILIFFS' FEES.

1. Service of summons, writ or warrant, issued under the seal of the Court, or Judge's summons on each person (except summons to witness and summons to jurymen :

Where claim does not exceed \$20	\$0 30
" " exceeds \$20 and does not exceed \$60	0 40
" " " \$60 and does not exceed \$100	0 50
" " " \$100	0 75

[In interpleader suits the value of the goods to regulate the fee.]
2. For every return as to service of summons, attending at the Clerk's office and making the necessary affidavit (as provided by Rule 90)..... 0 15
3. Service of summons on witness or jurymen, or service of notice.... 0 15
4. Taking confession of judgment and attending to prove 0 10
5. For calling parties and their witnesses at the sittings of the Court in every defended case, as provided by Rule 91, amended by Rule 168..... 0 15
6. Enforcing every writ of execution, or summons in replevin, or warrant of attachment, or warrant against the body—each

Where claim does not exceed \$20	0 50
" " exceeds \$20 and does not exceed \$60....	0 75
" " " \$60	1 00

[Executing summons in replevin includes service on defendant. The value of the goods to regulate the amount of the fee.]
7. Every mile necessarily travelled to serve summons or process, or other necessary papers, or in going to seize on attachment, or in going to seize on a writ of execution, where money made or case settled after levy,..... 0 12

[In no case is mileage to be allowed for a greater distance than from the Clerk's office to the place of service or seizure.]
8. Mileage to arrest delinquent under a warrant to be at 12 cents per mile, but for carrying delinquent to prison, including all expenses and assistance, per mile..... 0 20

9. Every schedule of property seized, attached or replevied, including affidavit of appraisal, when necessary :

Not exceeding \$20.....	\$0 30
Exceeding \$20 and not exceeding \$60	0 50
Exceeding \$60.....	0 75
 10. Every bond when necessary, when prepared by the Bailiff (including affidavit of justification) 0 50
 11. Every notice of sale, not exceeding three, under execution or under attachment, each..... 0 15
 12. There shall be allowed to the Bailiff, for removing or retaining property seized under execution or attached, reasonable and necessary disbursements and allowances, to be first settled by the Clerk, subject to appeal to the Judge
 13. There shall be allowed to the Bailiff five per cent. upon the amount realized from the sale of property under any execution, but such percentage not to apply to any overplus thereon
- [But if execution be satisfied in whole or in part after seizure and before sale, the Bailiff to be entitled to charge and receive three per cent. on the amount realized.]

S. J. JONES,
County Judge, County of Brant.

D. J. HUGHES,
County Judge, Elgin.

JAMES DANIELL,
County Judge, Prescott and Russell.

J. S. SINCLAIR,
County Judge, Wentworth.

Approved 15th December, 1884.

ADAM WILSON, C.J., Q.B.D.
M. C. CAMERON, C.J., C.P.
THOMAS GALT, J.
JOHN E. ROSE, J.

[N. B.—As to the meaning to be given to the different items of Clerks' or Bailiffs' Schedule of Fees, see Sinclair's D. C. Act, 1879, 338-345, and D. C. Act, 1886, 103-129.]

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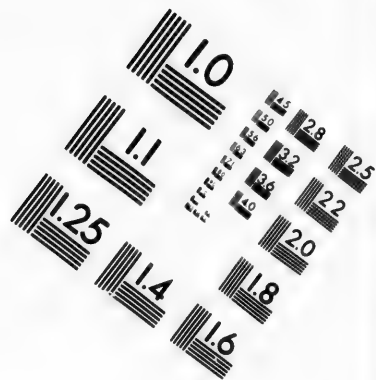
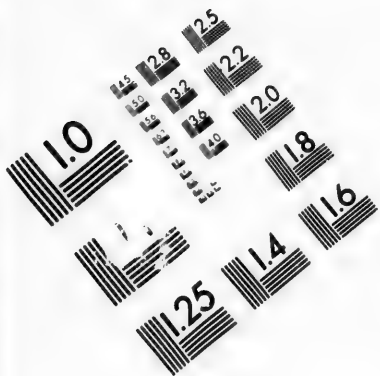
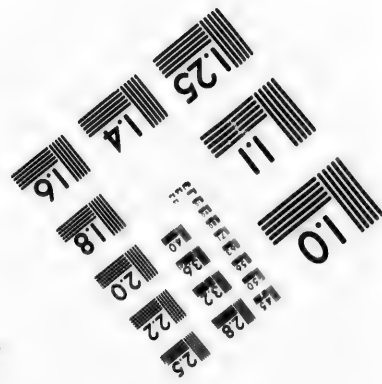
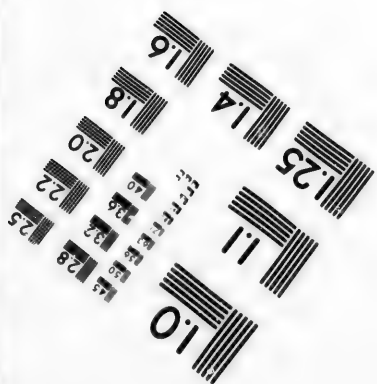
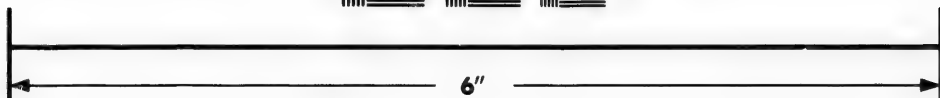
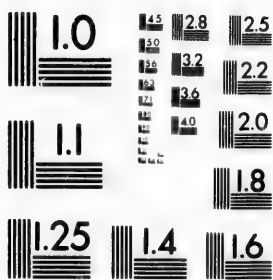


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